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LYON'S

NORTH CAROLINA DIGEST

A COMPLETE CIVIL DIGEST
OF THE REPORTS OF THE SUPREME COURT OF NORTH CAROLINA,
FROM VOLUME 139 THROUGH VOLUME 150, INCLUSIVE

VOLUME I

PREPARED BY
W. H. LYON, JR.
(OF THE RALEIGH BAR)

RALEIGH, N. C.
PRINTED FOR AUTHOR BY EDWARDS & BROUGHTON PRINTING COMPANY
1914

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W. H. LYON, JR.
NOV 21 1914**

INSCRIPTION

**This volume is respectfully dedicated to my
wife and my mother, who freely gave
that I might receive, and to
whom I owe what I am**

PREFACE

This volume is composed of three separate parts. The first is an alphabetical list of plaintiffs' names of all cases reported in volumes 139th through the 150th Reports, inclusive. In this table of cases will be found the references to subsequent cases, in which a given case has been approved as an authority, merely cited, distinguished from other cases, reversed, or a rehearing granted in our State Supreme Court, as well as the final determination of the case in the Federal Supreme Court.

The second part is an alphabetical list of defendants' names of all cases reported in the above volumes.

The third part is an index-digest of reported cases in the above volumes. The purpose has been to give a short, clear statement of the controlling points decided in each case, and to put that statement in such places that the point sought for may be easily found. If the work shall be of service to the busy practitioner, and afford a ready reference to the decisions, the author will feel that the toilsome days and sleepless nights spent in the gathering and compilation of the materials have been well spent.

I acknowledge with grateful thanks the advice, aid and encouragement given me by my friends upon the bench of the Supreme Court of North Carolina, Ex-Gov. W. W. Kitchin, Ex-Judge Jas. S. Manning, Ex-Judge Stephen C. Bragaw, U. S. Dist. Judge H. G. Connor, Judge C. C. Lyon, Dr. N. Y. Gulley, Armistead Jones, Esq., and Col. John W. Hinsdale.

W. H. LYON, JR.

Raleigh, N. C., July 1, 1914.

TITLES OF THE NORTH CAROLINA REPORTS

ABBREVIATIONS USED IN THIS BOOK, WHEN PUBLISHED, AND NUMBERS ADOPTED BY RULE OF THE SUPREME COURT AT FEBRUARY TERM, 1891

Rule 62 of the Supreme Court is as follows:

Inasmuch as all the Reports prior to the 63d have been reprinted by the State with the number of the volume instead of the name of the Reporter, counsel will cite the volumes prior to the 63 N. C. as follows:

Title.	When Published.	Abbreviations.	No.
1 and 2 Martin	1797-1896.....	1 Mar.; 2 Mar....	1 N. C.
Taylor and Conf.	1797-1896.....	Tay. and Con...	1 N. C.
1 Haywood	1799.....	1 Hay.	2 N. C.
2 Haywood	1806.....	2 Hay.	3 N. C.
1 and 2 Car. Law Repository and N. C. Term	1814-1816.....	1 and 2 C. L. R., Term Rep.	4 N. C.
1 Murphey	1822.....	1 Mur.	5 N. C.
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6 Iredell Law	1846.....	6 Ire.	28 N. C.
7 Iredell Law	1847.....	7 Ire.	29 N. C.

Title.	When Published.	Abbreviations.	No.
8 Iredell Law	1848.....	8 Ire.	30 N. C.
9 Iredell Law	1849.....	9 Ire.	31 N. C.
10 Iredell Law	1850.....	10 Ire.	32 N. C.
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In quoting from the reprinted reports counsel will cite always the marginal (*i. e.*, the original) paging, except 1 N. C. and 20 N. C., which have been re-paged throughout, without marginal paging.

LYON'S North Carolina Digest

VOLUME ONE—PART ONE

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LYON'S

North Carolina Digest

VOLUME ONE—PART TWO

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ABANDONMENT.

ABANDONMENT.

Action for support under Code 1292, dismissed when. *Bidwell v. Bidwell*, 139—402.

ABATEMENT.

Action against Register of Deeds, and his surety, abates upon death of officer. *Wallace v. McPherson*, 139—297.

A judgment is necessary to abate an action, and Court may, ex mero motu, enter judgment when plaintiff has failed for a year to prosecute his action against defendant's representatives. *Rogerson v. Leggett*, 145—7.

Abatement of a suit is the complete termination of it at law, and the abatement of main action abates proceedings ancillary or collateral to it. *Emry v. Chappell*, 148—330.

When same relief can be afforded in former action between same parties as in present action, later action should be dismissed; and it is immaterial what the position of respective parties on the record in the two suits may be, if full relief can be had in the first action. *Ibid.*, 148—332.

Pleas in abatement properly overruled, where at the time of issue of summons herein, another action between same parties was pending in United States circuit court, and non-suit was entered therein before complaint filed. *Kesterson v. R. R.*, 146—277.

Pendency of suit, in personam, in State court, which has not gone

ACCOUNT.

to judgment, may not be pleaded in abatement of suit between same parties for same cause of action in federal court. *Ibid.*, 146—277.

Plea in abatement must aver and proof affirmatively show, that former action is still pending at time of filing plea. *Ibid.*, 146—278.

Abuse of Process.

See Process, abuse of.

Accident.

See Negligence, accident.

Accommodation Paper.

See Negotiable Instruments.

ACCORD AND SATISFACTION.

Where there is an agreement to settle a demand for an agreed consideration, all or a portion of which is executory, defendant may set it up by making proper averments as to performance, as an accord and satisfaction of original demand. *Hayes v. R. R.*, 143—125.

ACCOUNT.

Administrator not entitled to credit for attorneys fees paid in improper litigation, or in consequence of his neglect or improper conduct. *Kelley v. Odum*, 139—278.

Verified statement of account showing number and kind of articles, catalogue numbers, price per dozen, etc., properly itemized under Rev. 1625. *Claus v. Lee*, 140—552.

ACCOUNT.

Mutual.—Credit placed on account by creditor, without authority of debtor, is not a mutual account so as to put statute in motion only from last item. *Supply Co. v. Dowd*, 146—198.

To make an account a continuing one from its commencement to its close, there must be mutual accounts between the parties, or an account of mutual dealings kept by one only, with knowledge and consent of other. *Ibid*, 146—198.

Stated.—When an account rendered is not objected to in a reasonable time, failure to object will be regarded as an admission of its correctness by the party charged, and evidence of plaintiff's habit of drinking liquor excessively was competent, where defendant denied his competency to transact business or to keep the account correctly. *Davis v. Stephenson*, 149—116.

ACTION.

Decree obtained in State of Plaintiff's domicile, and personal service had upon defendant within jurisdiction, renders judgment valid both in rem and in personam. *Bidwell v. Bidwell*, 139—402.

Actions, both legal and equitable, covered by Code 158. *McAden v. Palmer*, 140—258.

Where cause of action is same, and plaintiff has had opportunity in former suit of recovering what he seeks in second action, former recovery is bar to latter action. *Bunker v. Bunker*, 140—22.

During continuance of partnership, one partner cannot sue another on any special transaction which may be made an item of charge or discharge in general partnership account. *Ledford v. Emerson*, 140—288.

One partner during continuance of partnership cannot ordinarily bring trespass against other on account of partnership property, unless it be destroyed or beyond reach of complaining party. *Ibid*, 140—288.

If action for damages to land ac-

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crued in lifetime of decedent, it survives to representative; if after death, belongs to heirs or devisee. *Mast v. Sapp*, 140—533.

Where right of party is once violated, even in ever so small a degree, injury at once springs in existence. *Ibid*, 140—533.

Not necessary that illegal transaction be fully executed, to deprive one of right to repudiate and recover money paid thereon. *Edwards v. Goldsboro*, 141—61.

Law gives no action to a party upon an illegal contract. *Ibid*, 141—72.

When water falls from the roof of one's building and injures adjacent property, action lies. *Davis v. Smith*, 141—110.

No one is legally liable for accidental injury. Injury resulting from negligence is not an accident. *Davis v. Traction Co.*, 141—141.

No action lies for indemnity for any time subsequent to summons. *Rayburn v. Casualty Co.*, 141—425.

Protest against enterer on State's land is not a civil action, but is to determine right of enterer. *Bowser v. Wescott*, 145—56.

If plaintiff was prevented from bringing action during statutory period by conduct of defendant that makes it inequitable for him to plead the statute, or by agreement not to do so, he cannot defeat plaintiff's action by interposing the plea. *Tomlinson v. Bennett*, 145—281.

A vested right of action has the character of property as a part of intestate's estate, and for purpose of devolution and transfer, right of claimant should be fixed as of time when intestate died. *Neill v. Wilson*, 146—245.

While distinction between actions at law and suits in equity is abolished, equitable rights and remedies are not thereby destroyed and no such result follows the change in the forms of procedure. *Rudisill v. Whitener*, 146—413.

Where sheriff wrongfully seized machinery and it was injured by freezing, caused by his lack of ordinary care, an actionable wrong is

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established. *Gay v. Mitchell*, 146—510.

Before Judge at Chambers.—Action by road commissioners to compel county treasurer to pay over road fund, is not a money demand, and may be brought before judge at chambers, and if anyone is aggrieved because of his failure to pay over, mandamus lies. *Coleman v. Coleman*, 148—301.

Caption.—In trial of issue *devisavit vel non*, cause should be entitled "In re Will of," etc. *Fraley v. Fraley*, 150—516.

Consolidated.—Where plaintiff was injured in collision between street car and train, and one allegation of negligence was failure of defendants to make and enforce rules as to their crossings, proper to consolidate the separate action against each defendant for trial. *Martin v. R. R.*, 148—262.

Defective Statement of Cause.—Demurrer will be denied, when complaint states defective cause of action which may easily be remedied by amendment, if necessary. *Poythress v. R. R.*, 148—396.

When it is alleged by enterer of vacant land, that defendant protested his entries before time limited for him to take out his grant, and thus prevented him from doing so, pending proceedings to determine validity of protest, failure to allege that notice of entry was reasonably given would be but defective statement of cause of action, which answer would waive. *Garrison v. Williams*, 150—678.

Joinder of Causes.—Action for breach of warranty and deceit may be joined when arise out of same transaction. *Smith v. Newberry*, 140—385.

Action for wrongful conversion of assets by corporation and another may be brought against them together. *Oyster v. Mining Co.*, 140—135.

Where different causes of action are of the same character and between same parties, and no additional expense or trouble will be in-

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curred, proper to join together. *McGowan v. Ins. Co.*, 141—369.

Action for specific performance may be joined with one for damages for breach of contract, delayed performance, or any other damages growing out of transaction. *Winders v. Hill*, 141—694.

Action for trespass and to settle disputed boundary may be joined in same complaint, but should be separately stated. *Fincannon v. Sudderth*, 144—587.

Action arising upon contract may be united in same complaint with one arising in tort, when they arise out of same transaction, or connected with same subject of action. *Hawk v. Lbr. Co.*, 145—48.

Action for penalty for delay, and value of goods lost, may be joined in same complaint. *Robertson v. R. R.*, 148—324.

Where suit for value of lost shipment is compromised, action for penalty for failure to settle may be brought afterwards, or both causes may be joined in the same complaint. *Albritton v. R. R.*, 146—487.

In action for penalty for damage to shipment, penalty lies only where just amount claimed is recovered, and may be sued for in different action from one for loss. *Rabon v. R. R.*, 149—61.

Joinder of Parties.—Tenants in common may join in one action, yet when thus joined they recover in accordance with their several rights. *Cameron v. Hicks*, 141—37.

Misjoinder for two persons, suing each for his own mental suffering, to unite in the same action. *Helms v. Tel. Co.*, 143—394.

In action for tort, plaintiff may make it joint or several, at his election, and wrong-doer cannot complain. *Hough v. R. R.*, 144—696.

Joint action does not lie against two or more persons for words spoken, unless defendants are connected by allegation and proof of a common design and purpose. *Rice v. McAdams*, 149—30.

Survive.—Where there is at death remaining unexpired any part of

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time limited, but it will expire in less than "one year after death," of the creditor, or in less than "one year after issuing letters on debtor's estate," such one year includes and is not added to, the unexpired statutory time. *Lowder v. Hathcock*, 150—440.

Transferred to Superior Court.—If issues of fact are to be tried, or case has been improperly brought before judge at chambers, it should be transferred to superior court for trial at term, and not dismissed. *Coleman v. Coleman*, 148—301.

Upon Relation of State.—Action for penalty for delayed shipment is given to "party aggrieved," and need not be brought "on relation of State." *Robertson v. R. R.*, 148—326.

When to be brought.—When there are no debts or other exigencies requiring retention of funds, distributee may within the two years allowed for final account, sue for them. *Caviness v. Fidelity Co.*, 140—58.

To rescind contract, injured party must act promptly after discovery of fraud; he may not rescind in part and affirm in part. *May v. Loomis*, 140—351.

Entering upon land and cutting timber constitutes a continuing trespass for which successive actions may be brought, damages recovered in each to date of writ. *Lumber Co. v. Lumber Co.*, 140—437.

Where time for delivery of goods is postponed by mutual consent, time fixed by last postponement is time when damages should be estimated. *Hosiery Co. v. Cotton Mills*, 140—455.

Covenant of seisin broken, if at all, upon delivery of deed, and covenantee may sue upon it though he had parted with the title. *Eames v. Armstrong*, 142—507.

Stockholders who seek to prevent consummation of illegal corporate acts, or to avoid it, should be swift to assert his rights. *Hill v. R. R.*, 143—559.

ADVERSE POSSESSION.**Ademption.**

See Executors and Admsrs., ademption of legacy.

Administrator.

See Executors and Admsrs.

ADMIRALTY.

In action for damages in State court for collision of two vessels, rules of admiralty courts in such cases do not apply. *Smith v. R. R.*, 145—101.

Admissions.

See Evidence, admissions and confessions.

ADVERSE POSSESSION.

Evidence sufficient. *Kirkman v. Holland*, 139—185.

Where one has deed conveying no title, enters upon and claims land as his own, possession is adverse. *Ibid.*, 139—185.

Upon execution sale of life tenant's interest, and subsequently by purchaser to him, seven years adverse possession would not run against remainderman till his death. *Norcum v. Savage*, 140—472.

Tax title conveying life estate, under Act of 1874, not color of title against remainderman, nor is possession adverse till death of life tenant. *Smith v. Proctor*, 139—314.

Adverse possession, which will ripen a defective title, must be of character to subject occupant to action. *Ibid.*, 139—314.

Adverse possession against married woman could not be counted prior to 1899. *Norcum v. Savage*, 140—472.

To raise presumption of grant, not necessary that possession adverse to State should be continuous and unceasing. *Bullard v. Hollingsworth*, 140—634.

When right of entry is barred and right of action lost by trustee, through adverse possession, cestui que trust barred also. *Cameron v. Hicks*, 141—21.

Actual ouster by one tenant in

ADVERSE POSSESSION.

common evidenced by clear, positive and unequivocal act, followed by possession for requisite time, bars co-tenant. *Dobbin v. Dobbin*, 141—210.

When entry and possession under tax deed are "under known and visible lines and boundaries," entry amounts to an ouster and seven years adverse possession ripens title. *Greenleaf v. Bartlett*, 146—495.

Adverse possession relates only to one having true title. *Berry v. Lbr. Co.*, 141—386.

"Connor Act" does not extend to a claim by adverse possession. *Janney v. Robbins*, 141—400.

In ejectment, where plaintiff's sister, who had deed, died in infancy without entry, and thereafter their father took possession and held it till his death, father not presumed to have entered in behalf of his children and there is no evidence that he had any title, his possession will not inure to them. *Barrett v. Brewer*, 143—88.

Actual possession, continuously, openly and adversely, by grantee of a tenant in common for twenty years, under deed describing metes and bounds, will toll the entry and bar the rights of the co-tenants. *Church v. Bragaw*, 144—126.

Defendant holding adverse possession without color of title for ten years, or any period of time less than twenty years, after sale under her mortgage and commissioner's deed to plaintiff therefor, does not toll the entry or defeat plaintiff's right to recover. Her former title is not such color as may be ripened into a good title by seven years adverse possession, it having passed to purchaser at the sale. *Call v. Dancy*, 144—494.

Plea of sole seizin by reason of twenty years adverse possession, raises an issue in bar of an account, and no order for accounting should be made till same has been determined. *Duckworth v. Duckworth*, 144—621.

Statute of limitations is sufficiently pleaded for title under ad-

ADVERSE POSSESSION.

verse possession when it appears by plain and reasonable intentment that defendants assert adverse possession for twenty years under known and visible lines. *Ibid*, 144—620.

In ejectment, where defendant does not show twenty years adverse possession, but plaintiff shows legal title, the law carries seizin to him, when neither is in possession. *Bland v. Beasley*, 145—169.

Possession under color of title must be continuous, uninterrupted and manifested by distinct acts of ownership to bar entry of one shown to be real owner; and when title is claimed by adverse possession, burden is on him who relies on such claim to show continuous possession. No presumption that possession is adverse. *Ibid*, 145—169.

See also *Mott v. Land Co.*, 146—527.

Prayers for instructions in adverse possession, commented upon. *Currie v. Gilchrist*, 147—656.

Possession, to be adverse, should be denoted by acts of dominion over it so repeated as to show that they are done as owner and not as occasional trespasser. *Currie v. Gilchrist*, 147—655.

If possession taken under junior title is of portion of land so very minute that true owner, in exercise of ordinary vigilance, might be ignorant that it included his land, or fairly mistake character of possession of occupant, doubtful if dis-seizin should extend beyond actual occupancy. *Ibid*, 147—654.

When grantee of deed is seated upon a part only of land covered by its boundaries, he must claim its boundaries in order to ripen by possession his title to the whole. He must claim the right and title to whole land, in order that his constructive possession may extend to the whole. *Haddock v. Leary*, 148—381.

Generally, where one enters into land under a claim of title by deed, his entry and possession are referred to such title, and his seizin

ADVERSE POSSESSION.

is deemed co-extensive with boundaries stated in his deed, where there is no adverse possession of any part of the land so described in any other person. *Ibid*, 148—380.

Grantor in prior deed with warranty, may acquire title to the same land by purchase from his grantee, or those claiming under her, or he could, after such conveyance, acquire title against her by adverse possession. *Chatham v. Lunsford*, 149—365.

Title to property may pass, and true owner may be precluded from asserting his title as against a purchaser from one having no title, by conduct which comes within the definition of an estoppel in pais. *Supply Co. v. Machin*, 150—743.

What is not.—Getting firewood and straw on land for twenty years is not sufficient evidence of adverse possession. *McCaskill v. Walker*, 145—253.

Generally, those occupying parental and filial relations, possession presumed permissive, not adverse. *Campbell v. Everhart*, 139—503.

Where one clears land covered by grant, fences it, uses house, grazes cattle, and pays taxes, sufficient evidence of adverse possession. *Vanderbilt v. Johnson*, 141—370.

Railroad company owns its right of way as a necessary means of discharging its duty as common carrier to the public, and can not dispose of it, or, by permissive user, as a passway, confer any rights upon the public inconsistent with the purpose for which it has been acquired. *Muse v. R. R.*, 149—445.

Advertisement.

See Mortgage, advertisement and sale.

Agency.

See Principal and Agent; Principal and Surety.

Agricultural Liens.

See Liens, crop.

APPEAL.**ALIEN.**

An alien may hold lands until his estate be divested by an office found or some other equally solemn sovereign act. *Johnston v. Lbr. Co.*, 144—717.

Allimony.

See Divorce and Allimony.

Ambiguity.

See Evidence, ambiguity.

Amendments.

See Pleadings, amendments.

ANSWER.

Defendant in his answer may disclaim portion of locus in quo and put in issue title to a specific part. *Crawford v. Masters*, 140—205.

In direct contempt instituted by rule to show cause, respondent may answer, and appeal. *Ex Parte McCown*, 139—95.

Judge has discretion to permit answer to be filed, after demurrer was overruled, even if it was frivolous. *Parker v. R. R.*, 150—435.

Sufficiency of Denial.

Answer alleging that defendant "is advised, informed and believes that the first article of the complaint is not true, and therefore denies the same," is sufficient to raise the issue. *Gordner v. Lbr. Co.*, 144—110.

Answer that defendant "has no knowledge or information sufficient to form a belief as to the truthfulness thereof; therefore denies the same," is insufficient denial of matters alleged to be in personal knowledge of defendant, and judgment on that allegation for want of denial was proper. *Streator v. Streator*, 145—338.

Every material allegation of complaint must be denied, or it will be admitted as true. *Willis v. Tel. Co.*, 150—324.

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Motion to dismiss appeal allowed where case tried in October, 1904,

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and docketed fall term, 1905. *S. v. Telfair*, 139—555.

Where demurrer sustained, appellant should note exception and present it for review from final judgment. *Bernard v. Shemwell*, 139—447.

Craving appeal not sufficient. Appellant must look after case and see that appeal made effectual. *Love v. Love*, 139—363.

Orders of Corporation Commission must be reasonable; subject to be reviewed by superior and supreme courts. *Corporation Com. v. R. R.*, 139—126.

Setting aside report of commissioners for indiscretion, supreme court will not reverse. *Hawks v. Hall*, 139—179.

Where appellant enters general appearance, return to notice of appeal not signed by justice, valid. *Ibid*, 139—176.

Justice may be attached for failure to make return to notice of appeal. *Ibid*, 139—177.

In direct contempt instituted by rule to show cause, respondent may answer, and appeal. *Ex Parte McCown*, 139—95.

Where defendant recovers judgment of plaintiff, who appealed, new trial granted, and defendant again recovers, plaintiff is taxable with costs of first trial. *Williams v. Hughes*, 139—16.

Code, secs. 525-6 and 540, relating to taxation, refers to final recovery upon merits. *Ibid*, 139—16.

When court at close of testimony withdrew portion of plaintiff's evidence from jury, he may submit to involuntary nonsuit and appeal. *Hayes v. R. R.*, 140—131.

It is duty of appellant to docket "record papers" in apt time and upon call of district ask for certiorari where "case" not settled in time. *S. v. Telfair*, 139—555.

Writ of habeas corpus never performs office of appeal. *Ex Parte McCown*, 139—95.

To constitute reversible error, must appear that appellant's rights have in some way been prejudiced.

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Hoslery Co. v. Cotton Mills, 140—452.

Where appeal is expressly or impliedly given, courts may look to other general statutes regulating appeals in analogous cases and give them such application as the particular case may warrant. *Cook v. Vickers*, 141—101.

Too late after trial to make exceptions to evidence or other matters occurring during a trial, except as to charge. *Alley v. Howell*, 141—113.

Report of commissioners in condemnation, assessment of damages, exception and appeal, practice. *Durham v. Riggsbee*, 141—128.

Motion to dismiss in justice's court not abandoned, by being denied and proceeding with trial and appealing to superior court. *Woodward v. Milling Co.*, 142—100.

After judge has settled case on appeal, supreme court has no power to order judge to make sundry changes in "case." *Slocumb v. Const. Co.*, 142—349.

In "settling case," judge may disregard both cases and should do so if he finds the facts of the trial different. *Ibid*, 142—350.

Where parties agree upon time for service case and counter case, courts can not further extend it. *Cozart v. Assurance Co.*, 142—522.

Custom of bar in county where case tried can not prevail against statute as to appeals, nor against agreement of parties. *Ibid*, 142—522.

Compliance with statutory regulation as to appeals is condition precedent, without which (unless waived) right to appeal does not become potential. *Ibid*, 142—522.

Where both parties appealed, the record in defendant's (appellee's) appeal can not be looked into in considering plaintiff's appeal, and decision in that appeal must determine whether there shall be a new trial or not. *McCullock v. R. R.*, 146—320.

When court adopts "appellant's case as amended by appellee's exceptions," appellant should have

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case thus modified, redrafted and submitted to judge for signature. *Gaither v. Carpenter*, 143—240.

Case on appeal should contain such incidents of the trial as were duly excepted to. *Ibid*, 143—240.

Defendant can not, by second appeal, review former decree of this court. *Green v. Green*, 143—406.

Decision of supreme court can not be reviewed by second appeal; only way is by petition to rehear. *Holland v. R. R.*, 143—437.

Copy of record in former suit, when sent up as part of case on appeal in this action, must be mentioned in the complaint as an exhibit, or be referred to as a part of the pleading. *Moore v. Gulley*, 144—86.

Findings, supported by evidence that witness is an expert, are not reviewable. *Allen v. Traction Co.*, 144—288.

When actions are united and tried together, and not consolidated in the sense that they become one action, nor within Revisal, secs. 469 and 411, and verdict being substantially different as to each party, separate appeals should be taken. *Williams v. R. R.*, 144—498.

Referee's findings, supported by evidence and affirmed by the judge on hearing, are conclusive on appeal. *Fray v. Lbr. Co.*, 144—759.

See also *Thornton v. McNeeley*, 144—622.

Exceptions to evidence, and language of judge in withdrawing improper evidence from jury will not be considered on appeal, unless taken on the trial at the time. *Daniel v. R. R.*, 145—51.

Judgment will be affirmed where no statement of case on appeal is tendered or served on appellee, and no case is in record proper. *State v. Lewis*, 145—585.

In supreme court the presumption is against error of judge, and appellant, to succeed, must make it appear. *Bernhardt v. Dutton*, 146—209.

See also *Gerock v. Tel. Co.*, 147—8.

Where both parties appeal, and appellee does not desire a modifica-

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tion of judgment appealed from, his appeal will be dismissed. *McCulloch v. R. R.*, 146—320.

On appeal from order refusing or continuing an injunction to the hearing, Supreme Court can review findings of fact made by court below. *Burns v. McFarland*, 146—383.

When one loses his suit in Supreme Court, it will not then review questions then decided, in a second appeal. *Gerock v. Tel. Co.*, 147—6.

No appeal lies when it appears that contentions are purely ones of fact, which have been found by jury upon proper evidence and instructions. *Meadows v. Wharton*, 147—180.

When record on appeal discloses a controversy largely of fact, fairly and clearly presented to jury who decided adversely to defendant, no appeal lies. *Perry v. Perry*, 147—368.

If exception be to a ruling of the court on a question of evidence, testimony should be so set out that its relevancy can be seen. *Thompson v. R. R.*, 147—415.

Unless given in express terms, appeal only lies from orders and rulings of Corporation Commission when they affect some right or interest of parties to controversy. *Hardware Co. v. R. R.*, 147—483.

Appeal from ruling upon one of several issues will be dismissed. *Shelby v. Ry. Co.*, 147—537.

When demurrer to whole cause of action or whole defense is either overruled or sustained, appeal lies, but not where demurrer as to one cause of action is sustained. *Ibid.*, 147—538.

Appellant cannot be heard to complain that there was a slight technical deviation from usual procedure in such cases, and where no substantial irregularity has prejudiced his rights. *Bradburn v. Roberts*, 148—216.

Where action is to enjoin cutting a tree, and pending appeal tree has been cut by city, appeal will be dismissed without prejudice to

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right to sue for damage. *Harrison v. Bryan*, 148—315.

When all essential facts, upon which rights of parties depend, appear upon pleadings or have been found by jury, Supreme Court will not upon mere question of form set aside judgment and subject parties to new trial. *Rich v. Morisey*, 149—41.

If plaintiff is dissatisfied with ruling of judge in sustaining demurrer to complaint, he should appeal instead of amending it, and he may not thereafter assign it for error. *Rice v. McAdams*, 149—30.

When new trial has been granted in appeal of one party, appeal in same action by other party will be dismissed. *Hawk v. Lumber Co.*, 149—17.

State may not appeal from order releasing defendant in habeas corpus proceeding. *In re Williams*, 149—437.

Writ of recordari may be used either as a substitute for an appeal or as a writ of false judgment. Applicant must show merit in his case and that he has not been guilty of laches. *Marler Co. v. Clothing Co.*, 150—522.

Assignment of Errors — Brief should point out portion of charge excepted to. *In re Murray's Will*, 141—588.

Where exceptions separately stated and numbered, but not tabulated at end of case, if error plainly apparent, motion to affirm denied. *Hicks v. Kenan*, 139—337.

Assignment of errors relied on, to be inserted at end of case on appeal of record. *Ibid.*, 139—337.

"Broadside" assignment of error in petition to re-hear, not considered. *Bunn v. Braswell*, 142—114.

Rules 19-20-27 of Supreme Court as to assignments of errors are not usually complied with by making a short excerpt from stenographer's notes, and assignments should be made to only those exceptions which may in some way have operated to client's prejudice. *Thompson v. R. R.*, 147—415.

Exceptions taken out of abundant

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caution during trial, should be carefully gone over and all eliminated except those which on reflection are deemed vital. *Britt v. R. R.*, 148—38.

When case is submitted upon agreed statement of facts or upon demurrer, no exception or assignment of error is necessary. *Mershon v. Morris*, 148—51.

On appeal from judgment on a demurrer, assignment of error should specify which of the grounds set out in the demurrer will be relied upon on appeal. If only one, that should be specified, else the demurrer is general and is to be disregarded. *Ullery v. Guthrie*, 148—419.

An appeal is itself a sufficient exception and assignment of error to the judgment, for that appears upon the face of record proper, and Rule 21 requiring summary of exceptions taken on trial and to charge of court, must be complied with. *Ibid.*, 148—418.

Assignment of error not stated in brief is deemed abandoned. *Brown v. R. R.*, 147—138.

See also *Jones v. Ballou*, 139—528; *Condor v. Secrest*, 149—203; *Smith v. Alphin*, 150—427; *R. R. v. R. R.*, 148—66; *Smith v. Moore*, 149—189; *State v. Freeman*, 146—616; *Smith v. R. R.*, 142—21.

Case — Correctness of judge's charge not reviewable in absence of case on appeal duly served and settled. *Clothing Co. v. Bagley*, 147—39.

Where there is no case on appeal. It is proper to move to affirm judgment below, and if this motion is not made, it is duty of court, *ex mero motu*, to inspect record proper for such errors. *Wallace v. Salisbury*, 147—59.

No case on appeal is necessary when judgment below is rendered upon case agreed or demurrer, or from order granting or refusing injunction, as pleadings and affidavits constitute record proper. *Ibid.*, 147—59.

Dismiss — Judgment of non-suit relates to cause of action, and not

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amount of damages. *Hoss v. Palmer*, 150—18.

Judgment of court below will be affirmed for want of case on appeal, settled and signed by counsel or judge, and when no error appears on face of record. *Lbr. Co. v. Branch*, 150—110.

Appeal will not lie from interlocutory order in action to recover interests in timber, determinative only, under agreement of counsel, of question of title, leaving objections and exceptions as to damages open for future determination. *Moore v. Lbr. Co.*, 150—263.

Unless some question of law or legal inference is involved, granting or refusing new trial upon any or all of the issues rests in sound discretion of court, and action of court is not reviewable. *Billings v. Observer*, 150—543.

Divided Court.—Where members of court are equally divided in opinion, judgment of court below will be affirmed. *Gattis v. Kilgo*, 140—109.

Docketing.—Motion to dismiss because appeal not docketed in time, may be made with clerk, either in or out of term. *Craddock v. Barnes*, 140—428.

It is duty of appellant to docket "record paper" in apt time, and upon call of district ask for certiorari where "case" not settled in time. *S. v. Telfair*, 139—555;

Craving appeal not sufficient. Appellant must look after case and see that appeal made effectual. *Love v. Love*, 139—363.

Motion of appellee to dismiss under Rule 5, where appeal is not docketed "seven days before call of the district to which it belongs," will be denied where motion is not made upon call of district and subsequent to docketing of appeal. *Foy v. Gray*, 148—436.

Dismissal of appeal from justice's judgment has same effect of judgment being affirmed, when appeal is not docketed by appellant as required by statute. *McClintock v. Ins. Co.*, 149—36.

Under certain conditions motion to docket appeal from justice's

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judgment may be allowed *nunc pro tunc*, but where appellant has neither paid clerk's fees nor requested him to docket appeal, nor paid any attention to it for eleven months, during which five terms of court have passed, refusal of judge to allow appeal to be docketed is not reviewable. *Ibid*, 149—36.

From Clerk.—Upon appeal from clerk in contempt proceedings, judge may allow additional affidavits on hearing before him. In re *Scarborough's Will*, 139—423.

When a case is before the judge on appeal, he may try it or remand to clerk with instructions. In re *Wittkowsky's Land*, 143—248.

Clerk's findings of fact upon preliminary allegations under *Revisal* 2580 are not final and may be appealed from. *R. R. v. R. R.*, 148—64.

Clerk may correct mistake made in prematurely ordering land partitioned, by revoking order and directing proceeding to be docketed for trial. *Little v. Duncan*, 149—85.

Where issue in partition proceeding transferred to civil issue docket, and finally brought before judge, in term time, he should have disposed of it upon its merits. *Ibid*, 149—85.

From justice's court.—Appeal from justice's judgment in civil action should be docketed by next subsequent term of superior court, even if it be a criminal term; and all fees must be paid. *Lentz v. Hinson*, 146—31.

On appeal from justice's judgment to superior court, trial is *de novo* and judge may allow reply to be filed to counterclaim. *Teal v. Templeton*, 149—34.

Appeals from county commissioners are governed by rules applying to appeals from justices of the peace and must be docketed at first ensuing term of superior court. *Sutphin v. Sparger*, 150—518.

Non-appealable orders.—Where demurrer sustained and no order made directing another to be made

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party, no appeal lies now. *Bernard v. Shemwell*, 139—446.

Courts will not permit needless delays and expense resulting from fragmentary appeals. *S. v. Dewey*, 139—559.

Denial, without reasons, of motion to make additional party defendant, a proper but not necessary one, not reviewable. *Aiken v. Mfg. Co.*, 141—339.

Refusal to hold demurrer frivolous, not appealable. *Morgan v. Harris*, 141—359.

Voluntary nonsuit taken by plaintiff, after defendant's motion denied, because of disagreement between court and plaintiff's counsel as to measure of damages, no appeal lies. *Merrick v. Bedford*, 141—504.

Refusal of motion to continue is in discretion of trial judge and not reviewable except for gross abuse of discretion. *Lanier v. Ins. Co.*, 142—14.

Superior court has ample powers in all questions of practice and procedure, both as to amendments and continuances, and exercise of its discretion is not appealable. *Bernhardt v. Dutton*, 146—208.

Refusal of judge to set aside referee's report for newly discovered evidence is not reviewable. *Henderson v. McLain*, 146—333.

Refusal of judge, in his discretion, to set aside verdict, is not reviewable. *S. v. Arnold*, 146—604.

Granting of new trial because verdict is against weight of evidence, is not reviewable. *Clothing Co. v. Bagley*, 147—38.

Refusal of motion to amend complaint is discretionary with judge, and exercise of his discretion is not reviewable. *Coleman v. Coleman*, 148—302.

Premature.—Appeal from order of re-reference of case, to find material fact, premature. *Chemical Co. v. Lackey*, 140—32.

Suffering nonsuit upon adverse intimation of judge, which does not take case from jury, premature. *Midgett v. Mfg. Co.*, 140—361.

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No appeal lies to extension of time to file defense bond in ejectment, and where appeal is taken when no appeal lies, court below need not stay proceedings. *Dunn v. Marks*, 141—232.

Appeal from order of clerk appointing commissioners in condemnation proceedings, under Rev. 2580, is premature, and no appeal lies from order of judge remanding to clerk. *R. R. v. Bailey*, 143—380.

Where an exception and appeal was entered to order of court setting aside verdict upon one issue, and granting new trial upon that alone, but no judgment, appeal is premature. *Jarrett v. Trunk Co.*, 144—299.

When appeal is dismissed as premature, it is equivalent to "noting an exception." *Gray v. James*, 147—141.

In action by junior mortgagee against senior mortgagee restraining him from foreclosing upon all land in his mortgage, and defendant mortgagor set up affirmative defense that more land was conveyed in plaintiff's mortgage than was intended, appeal by plaintiff from adverse judgment on affirmative defense was premature. *Ibid*, 147—141.

Appeal from order permitting party to withdraw exceptions to referee's report, and his demand for jury trial, is premature. *Greenlee v. Greenlee*, 150—639.

Rules of supreme court.—Motion to dismiss appeal allowed, upon failure to comply with rules, without discussing merits of case. *Davis v. Wall*, 142—451.

When appeal bond is not filed at or before time of docketing appeal, supreme court will not reinstate case and allow bond to be filed, unless laches is negatived or reasonable excuse shown. *Vivian v. Mitchell*, 144—472.

Non-compliance with requirements which entitle appellant to have his case reviewed can not be excused because failure to observe

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them is due to negligence of counsel. *Ibid*, 144—477.

When appeal is not docketed as required by Rule 5, appellant may docket any time during the term, unless appellee had previously moved to dismiss under Rule 17. *Laney v. Mackey*, 144—630.

Supreme court has ample authority to prescribe rules for practice, and where made, they are mandatory. *Lee v. Baird*, 146—363.

To make excerpts from stenographer's notes of any and every exception taken, without earnest consideration of counsel, would not be a fair observance of Rule 19, subdivision 2. *Ibid*, 146—362.

Appeal will be dismissed where rules are not followed, except in rare instances and unless cogent excuse is shown. *Ibid*, 146—364.

Making excerpts from stenographer's notes and failing to group and number exceptions relied on immediately after end of case on appeal, are grounds for motion to dismiss appeal. *Burnett v. Kuykendall*, 146—597.

Motion of appellee to dismiss under Rule 5, where appeal is not docketed "seven days before call of the district to which it belongs," will be denied, where motion is not made upon call of district and subsequent to docketing of appeal. *Foy v. Gray*, 148—436.

Record.—Assignment of errors relied on, to be inserted at end of case on appeal or record. *Hicks v. Kenan*, 139—337.

Costs divided where unnecessary portions of record are sent up at request of appellee. *Wilson v. R. R.*, 142—341.

Appellant's "statement of case on appeal" should not be sent up or docketed as part of transcript. *S. v. Dewey*, 139—557.

Making excerpts from stenographer's notes and failing to group and number exceptions relied on immediately after end of case on appeal, are grounds for motion to dismiss appeal. *Burnett v. Kuykendall*, 146—597.

Rules 19, 20, 27 of supreme court

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as to assignments of errors are not usually complied with by making a short excerpt from stenographer's notes, and assignment should be made to only those exceptions which may in some way have operated to client's prejudice. *Thompson v. R. R.*, 147—415.

An appeal is itself a sufficient exception and assignment of error to the judgment, for that appears upon the face of record proper, and Rule 21 requiring summary of exceptions taken on trial and to charge of court, must be complied with. *Ullery v. Guthrie*, 148—418.

The clerk, in sending up transcript should be guided solely by order of the judge, and send no other papers than those directed by him. *Clark v. Machine Works*, 150—89.

Stenographic notes not relevant to the exceptions should be eliminated from the record. *Supply Co. v. Machin*, 150—748.

When taken.—Owner's appeal from order confirming report of road commissioners should be taken at same session of county commissioners. *Sutphin v. Sparger*, 150—518.

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General.—When general appearance entered, any existing defect of parties waived. *Cherry v. Canal Co.*, 140—422.

Where appellant enters general appearance, return to notice of appeal not signed by justice, valid. *Hawks v. Hall*, 139—176.

Agreement to try in justice's court before return day does not amount to general appearance. *Woodward v. Milling Co.*, 142—100.

Test as to kind of appearance entered, is relief asked; law looks to substance rather than form. *Ibid*, 142—100.

Where defendant enters special appearance and moves to dismiss for defective service, and upon motion being overruled, enters general appearance, personal judgment may be rendered against him. *Lemly v. Ellis*, 143—201.

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Where there was a general appearance by counsel for all defendants and answer filed, judgment can not be attacked collaterally, even if attorney had no authority to act, and though some were infants. *Rackley v. Roberts*, 147—207.

Special.—Where one appears specially in justice's court and moves to dismiss, and motion is denied, he should preserve his point by exception and proceed to trial. He can not after judgment enter special appearance by appeal. *Allen v. R. R.*, 145—41.

Application.

See *Payment*, application of.

ARBITRATION AND AWARD.

Agreement made in good faith to compromise and settle disputed matters is valid, and will be sustained upon highest consideration of public policy. *York v. Westall*, 143—276.

Where agreement to submit matter to arbitration is entered into, with provision for selection of an umpire, award is invalid unless parties have notice of time and place of meeting and have opportunity to offer evidence before umpire. *Bray v. Staples*, 149—94.

In action for injury from maintenance of pond and to enjoin rebuilding of dam, parties may by consent order of arbitration, voluntarily enlarge scope of controversy to include in award a scheme of drainage. *Snell v. Chatham*, 150—735.

Arrest.

See *False imprisonment*; *Fraud*, arrest for.

ARREST AND BAIL.

Plaintiff entitled to arrest and bail against his copartner when facts bring the claim within statute. *Ledford v. Emerson*, 140—288.

Discharge from custody.—Secs. 735-737 and 1920 of Revisal, prescribing methods by which a pris-

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oner may be discharged, in certain instances before judgment, should be construed together. *Edwards v. Sorrell*, 150—715.

Defendant in action for alienation of affections of plaintiff's wife, may take insolvent debtor's oath, and upon his filing a full and true inventory of all his property, with encumbrances thereon, is entitled to discharge from custody. *Ibid*, 150—717.

Allegation that title was taken in name of husband and wife to defraud husband's creditors, where he paid for land and procured deed in June, 1907, and liability was created in March, 1909, not sustained. *Ibid*, 150—717.

Where debtor charged with fraud, is in custody, and has scheduled all of his property, answer to petition denying statement made therein as to the reaching of his interest in land by an execution, does not raise an issue of fraud. *Ibid*, 150—718.

Assessment.

See *Eminent Domain*; *Taxation*; *Municipal Corporations*.

Assets.

See *Executors and Administrators*, accounts; *Corporations*, insolvency and dissolution.

ASSIGNMENT.

If action is assignable, at law or in equity, assignee is real party in interest and equitable owner must sue in own name. *Cunningham v. R. R.*, 139—427.

Rights acquired by subrogation do not depend upon written assignment of claim. Upon payment by insurer, it is assigned in equity. *Ibid*, 139—436.

When mortgage transferred, but not mortgage debt, assignee may be regarded as having interest in debt for which note and mortgage were securities. *Chemical Co. v. McNair*, 139—332.

By assignment of lien bond assignee acquires right to account for

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securing payment of which bond was given. *Ibid*, 139—326.

Contract for money to become due in future, may be assigned and when due, assignee may sue and recover in his own name. *Ibid*, 139—331.

In contract to assign accounts as collateral security, what passes? *Ibid*, 139—326.

Notice to debtor of assignment of non-negotiable instrument, necessary to protect assignee from payment to original creditor. *Ibid*, 139—326.

Notice to debtor not necessary to validity of assignment of non-negotiable instrument as between assignor and assignee. *Ibid*, 139—326.

Certain parties to suit can not attack assignment of other parties to suit of their interest therein to attorney of opposing parties, when their interests are not affected. *Moseley v. Johnson*, 144—274.

Holders of property to secure pre-existing debts are purchasers for value within meaning of our registration laws, and would hold property if deed was good. *Odom v. Clark*, 146—554.

Where mortgage is made of the entirety of a large estate for a pre-existing debt (omitting only an insignificant remnant of property) it is in effect an assignment for benefit of creditors secured therein and requirements of assignment act must be complied with. *Ibid*, 146—553.

Equitable.—Where one having contracted to receive bonds in payment for land, agreed to assign bonds to bank in consideration of present loan, this was a present equitable assignment, though bonds were not then in hand. *Godwin v. Bank*, 145—327.

Where one agrees to buy a half interest in stock of goods of another, who agrees to assign the interest purchased, equity regards the assignment as being made as of the date of payment. *Godwin v. Cotton Mills*, 147—233.

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Assumption of Risk.

See Master and Servant, assumption of risk.

Assumpsit.

See Contracts, implied.

ATTACHMENT.

Only facts known to defendant at time of affidavit for warrant of attachment, to be considered upon question of whether he had probable cause. *Moore v. Bank*, 140—293.

Facts in this case constitute probable cause for attachment. *Ibid*, 140—293.

Funds arising from assessments by fraternal society, for benefit of widows and orphans of deceased members, not subject to attachment. *Brenizer v. Royal Arcanum*, 141—409.

Plaintiff in attachment suit not liable because officer levied on excessive quantity of property, unless he advised, directed or encouraged such action. *R. R. v. Hardware Co.*, 143—55.

An attachment on land is void and constitutes no lien where defendants had parted with their title before attachment issued. *Morrison v. Mining Co.*, 143—251.

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Where attorney speaks for client, or agent for principal in his presence, law regards client or principal as acting for himself. *Smith v. Moore*, 142—277.

Though one is not served with summons, if he appeared either personally or by duly authorized attorney, this waives service. *Hatcher v. Faison*, 142—364.

Unauthorized appearance by counsel, where no summons served, will not put party in court and bind him by judgment. *Ibid*, 142—364.

Under Rev. Ch. 5, applicant for license to practice law who complies with formal requisites prescribed by Sec. 208 is entitled to be examined, and if he have competent knowledge of the law, it is duty of Court to

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license him and investigation as to his general moral character no longer required. In re Application for License, 143—1.

Legislature has power to establish qualifications for one to become practising member of bar. *Ibid.*, 143—1.

As a general rule when a suit is commenced or defended, or any other proceeding is had therein, by one of the regularly licensed solicitors, it is not the practice of the Court to inquire into his authority to appear for his supposed client. *Harrill v. R. R.*, 144—544.

It is presumed that authority of an attorney to represent his client continues till there is evidence of its revocation. *Bank v. Perego*, 147—295.

Argument of.—Exception to language used by counsel, must be taken. *State v. Horner*, 139—603.

Exception to language of counsel ordinarily in discretion of trial judge, and this court will not review his discretion unless impropriety of counsel was gross. *Ibid.*, 139—603.

See, also, *Smith v. R. R.*, 142—21; *State v. Carrawan*, 142—575.

Where evidence of transaction incompetent under Code, Sec. 590, it was improper for defendant's counsel to comment on failure of plaintiff to testify on question of demand. *Davis v. Evans*, 139—440.

Where defendant's counsel in closing speech commented on a fact not relevant to issue, and argued erroneous proposition of law, immediately called to court's attention, failure of court to advert to it in charge, error. *Ibid.*, 139—440.

Tender of witnesses by defendant in order to have fees taxed, does not take from it the right to open and conclude argument. *Brown v. R. R.*, 140—154.

Judge has no right to deprive one of benefit of counsel's argument when confined in proper bounds and addressed to material facts. *Puett v. R. R.*, 141—332.

Failure of defendant to testify in

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civil suit, where facts are peculiarly within knowledge of parties, legitimate subject of comment before jury, subject to control of court. *Ledford v. Emerson*, 141—596.

Improper argument of counsel, comparing alleged revocatory words with will, will not constitute reversible error, where not called to court's attention and no exception taken. In re *Shelton's Will*, 143—218.

When objection is made to language used by counsel in argument to jury, judge should note down language at time. *Moseley v. Johnson*, 144—257.

Improper and reprehensible language uncorrected by trial judge, is ground for new trial. *Ibid.*, 144—257.

Errors of judge and improper language of counsel, must be excepted to at the time and upon the trial. *State v. Harrison*, 145—409.

Sharp retorts of counsel in argument of case, causing applause of several minutes, not ground for new trial when strongly reprimanded by judge, and when there was no intention to prejudice jury. *Ibid.*, 145—409.

Improper remarks of counsel are cured when court charged jury not to consider them, but the evidence. *State v. Peterson*, 149—536.

Compensation.—Personal representative may employ attorney whenever necessary to protect estate, or manage it properly. *Kelley v. Odum*, 139—278.

Administrator not entitled to credit in account for attorneys fees paid in improper litigation, or in consequence of his neglect or improper conduct. *Ibid.*, 139—276.

Executor is always personally liable to counsel for fee. *Ibid.*, 139—278.

Plaintiff not entitled to attorneys fees in suit against surety to building contract. *Donlan v. Trust Co.*, 139—212.

Duties of.—*Yarborough v. Hughes*, 139—206.

Witnesses testifying under sub-

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poena entitled to same respectful treatment by counsel as parties to cause. *Davis v. Kerr*, 141—11.

Law does not tolerate that same counsel may appear upon both sides of adverse proceeding. *Johnson v. Johnson*, 141—92.

Disbarred.—Ch. 941, L. 1907, does not impose upon the court the duty or confer the power to disbar an attorney because he has been "convicted" in the courts of another State or the United States. Rev. 211 disables the court from disbaring for the conviction of crime in another jurisdiction, in exercise of its "inherent power" to deal with its attorneys. *In re Ebbs*, 150—56.

Action to disbar an attorney is in the nature of a civil proceeding. *Ibid*, 150—48.

In proceeding to disbar an attorney for crime, the statute is confined to a conviction in this State *Ibid*, 150—51.

ATTORNEY, POWER OF.

Power of attorney to sell "all of our land in State of North Carolina" sufficiently definite. *Janney v. Robbins*, 141—400.

Where attorney having authority, and pursuant thereto, executes instrument in his own name, as attorney, for principal, and receives consideration, though deed be inoperative for want of formal execution in name of principal, it is binding in equity and will be enforced as an agreement to convey. *Rogerson v. Leggett*, 145—11.

Powers of an attorney are to be determined, in a large measure, from purpose of his employment; he has an implied authority to do anything incidental to the discharge of the purpose for which he was retained, but beyond this his power ceases. *Supply Co. v. Machin*, 150—744.

Where one attended sale of client's property, merely as attorney-at-law, and with no other powers, and he stated publicly that client had no interest in property

BANKRUPTCY.

about to be sold, client was not bound thereby. *Ibid*, 150—744.

Attorney General.

See Action, upon relation to State.

Auction and Auctioneer.

See Sales, auction.

Award.

See Arbitration and Award.

Bail.

See Arrest and Bail.

BAILMENT.

Where defendant retains possession of goods sold by him to plaintiff and paid for, under promise to ship in accordance with certain directions, he is liable for value of goods lost through his negligence. *Sprinkle v. Brimm*, 144—401.

Gratuitous.—There is no contract for carriage, and carrier is liable only as gratuitous bailee, where goods, not personal baggage, are offered for carriage, and the fact is not made known, or, notwithstanding, are accepted for carriage. *Brick v. R. R.*, 145—206.

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Every person buying at a bankrupt sale, as at one made by the sheriff, must take notice that nothing is sold except the interest of the bankrupt or the defendant in execution. *Supply Co. v. Machin*, 150—746.

Validity of assignment or claim is determined by principles of local law, unless bankruptcy act otherwise provides. *Godwin v. Bank*, 145—326.

Debts due.—Adjudication of bankruptcy of debtor does not make mortgage debt immediately due, when by its terms it has not reached its maturity. *Martin v. Kirkpatrick*, 149—401.

Title of Trustees.—Trustee in bankruptcy takes assets subject to

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rights, liens and equities against them in hands of bankrupt. *Smith v. Godwin*, 145—246.

Trustee in bankruptcy is vested with no better right or title to property than bankrupt had when trustee's title accrued. *Godwin v. Bank*, 145—326.

Trustee is estopped by acts of bankrupt and bound by its conduct and agreements to same extent that bankrupt would be bound before adjudication, especially in absence of fraud. *Watson v. Mfg. Co.*, 147—473.

Voidable preference.—To make a transfer voidable within provision of bankrupt act, what necessary. *Wright v. Cotten*, 140—1.

Knowledge of insolvency of debtor as foundation for reasonable cause to believe that unlawful preference intended. *Ibid.*, 140—1.

Title to property passes, where defendant without knowledge of insolvency and within four months prior to bankruptcy, received cross ties and paid present consideration. *Weeks v. Spooner*, 142—479.

Preference within four months prior to bankruptcy diminishes common fund and is invalid, but not where there is a full and fair present consideration. *Ibid.*, 142—479.

BANKS AND BANKING.

Instruction upon ratification of change of account from wife's account to that of husband's, correct. *Yarborough v. Trust Co.*, 142—377.

Payment of checks.—If bank pays forged check, and depositor not negligent, it cannot charge check to his account. *Yarborough v. Trust Co.*, 142—377.

Collections. — Paper deposited with bank for collection, payable at another place, bank at other place is agent of depositor and first bank liable for misconduct of sub-agent only where it fails to use due care in his selection. *Bank v. Floyd*, 142—187.

Negligence in bank having draft or check for collection to send it

BETTERMENTS.

directly to drawee, though drawee only bank at place of payment. *Ibid.*, 142—187.

Contract that out of town items are remitted at owner's risk until bank receives full actual payment, does not relieve it from its own negligence, but only from misconduct of sub-agents properly selected. *Ibid.*, 142—187.

Custom by which bank having check upon its out-of-town correspondent in good standing, entrusts it with collection, is unreasonable and takes upon itself risk of consequences. *Ibid.*, 142—187.

Bank liable where it received check for collection on correspondent bank, upon receipt by it check was cancelled and charged to drawer, who had sufficient funds to meet it, and correspondent bank then had sufficient funds to pay, and failed a week later without having remitted proceeds. *Ibid.*, 142—187.

Collaterals.—Bank entitled to retain necessary disbursements out of collaterals, to loan, where it comes into court to defend validity. *Lumber Co. v. Pollock*, 139—174.

Bank holds collaterals as trustee and its duty is to protect them. *Ibid.*, 139—174.

When creditor takes note of third person as collateral for his debt, he is bound to use due diligence to collect collateral. *Ibid.*, 139—174.

BASTARDY.

Bastardy proceeding is of a civil nature, intended merely for enforcement of police regulation. *State v. Addington*, 143—683.

Bequests.

See Wills.

Betting.

See Contracts, against public policy.

BETTERMENTS.

Plaintiffs, who are not parties to special proceeding to sell land, are entitled to recover land subject to right of defendant to have repaid amount they expended. *Card v. Finch*, 142—141.

BETTERMENTS.

In making allowance for betterments, general rule is amount by which value of land is enhanced, and not actual cost of improvements. *Alston v. McConnell*, 145—1.

Betterments not allowed where occupant entered under contract which expressly defined his rights, he wrongfully remained in possession in violation of contract, and made improvements after notice that true owner intended to assert his claim. *Ibid.*, 145—5.

Tenant has right to remove a window from house before he goes out, if it can be done without injury to freehold. *Critcher v. Watson*, 146—152.

To obtain claim for betterments, defendant must show that improvements were made in good faith, at a time when he believed, and had good reason to believe, that he was the true owner. *Faison v. Kelley*, 149—285.

While parol contract to convey land is void, law will grant relief against vendor, failing to make title to vendee, who has entered into possession, paid part of purchase price and put permanent improvements upon land, and will permit recovery of money paid as purchase price and value of improvements to extent of enhanced value, less reasonable rents and profits. *Ford v. Stroud*, 150—364.

BILL-BOARDS.

All statutory restrictions of the use of property are imposed upon the theory that they are necessary for the safety, health or comfort of the public, but a limitation which is unnecessary and unreasonable cannot be enforced, and this ordinance regulating placing of billboards is not enforceable. *State v. Whitlock*, 149—543.

Bill of Lading.

See *Carrier*, bill of lading.

Bill of Particulars.

See *Pleadings*.

BOND FOR TITLE.**Blind Man.**

See *Negligence*, defective streets.

BONDS.

Bonds given conditioned upon payment of any judgment in summary proceeding in ejectment, makes obtaining judgment condition precedent to recovery against sureties, and this must be shown by proper averment and proof. *Blackmore v. Winders*, 144—212.

Code Sec. 1996 does not confer on a township the right to issue bonds to aid in construction of a railroad upon which work has not been begun. *Wittkowsky v. Coms.*, 150—96.

BOND FOR TITLE.

What constitutes.—Vendor in contract for sale of land holds legal title as security for payment and may sell upon failure to pay. *Hairston v. Bescherer*, 141—205.

No presumption of abandonment of right to pay or call for deed when vendee is in possession and vendor does not enforce payment. *Ibid.*, 141—205.

When vendee is in possession of land after day for payment fixed in contract has passed, he makes no demand for deed nor does vendor subject land to pay debt, each estopped to take advantage of delay. *Ibid.*, 141—205.

Interest of vendee in bond for title, not subject to sale under execution upon judgment rendered for purchase money. *McPeters v. English*, 141—491.

Where there is contract for sale and conveyance of realty absolute and binding on parties, equity, for most purposes, considers contract as specifically executed; vendee becomes equitable owner of lands, and vendor is trustee of legal estate for vendee. *Sutton v. Davis*, 143—475.

In action to enforce vendor's lien for unpaid purchase money where bond for title was given, statute of limitations begins to run when possession of vendee has become hostile. *Worth v. Wrenn*, 144—656.

Where attorney having authority,

BOND FOR TITLE.

and pursuant thereto, executes instruments in his own name, as attorney for principal, and receives consideration, though deed be inoperative for want of formal execution in name of principal, it is binding in equity and will be enforced as an agreement to convey. *Rogerson v. Leggett*, 145—11.

Option and absolute contract of sale distinguished. *Davis v. Martin*, 146—282.

Paper writing wherein one contracts to convey certain lands at a given price, provided it be paid within three years from date, and a payment of \$25 "by way of earnest is made," is a bond for title, and time is not of essence. *Ibid.*, 146—281.

While burden of proof to show payment is upon grantee in possession of lands under contract to convey, when both parties are dead, and grantee and those claiming under him have been in possession for 28 years, evidence of payment is sufficient for jury which shows that bond for title and note of less amount, wrapped in it, with payee's signature to note cut out, were found among papers of deceased payer, written upon same kind of paper, and witnessed by same person. *Pool v. Anderson*, 150—625.

BOND ISSUE.

Purchasers of bonds issued under provisions of legislative acts are fixed with knowledge of its terms and conditions. *Lumberton v. Nueven*, 144—303.

Where tax rate has not reached limit contained in act, bond issue not invalid for failure to provide for payment of interest and sinking fund. *Ibid.*, 144—303.

An act authorizing bond issue was passed in accordance with constitution Art. II, Sec. 14. and in one House the name of wrong county was inserted in the bill, but under circumstances to clearly prove that proper county was intended, it is valid. *Improvement Co. v. Coms.*, 146—353.

BUILDINGS.

When township bonds give notice upon their face of act under which they were issued, and an examination of legislative journals would have disclosed that act was not passed in accordance with constitutional mandate, purchaser is put upon notice of defect in issue. *Wittkowsky v. Coms.*, 150—97.

Purchaser of bonds issued to pay necessary public expense need not see to application of proceeds. *Hightower v. Raleigh*, 150—572.

BOUNDARIES.

Natural.—Where call in deed is for certain distance to known fixed line of another tract, distance will be disregarded and line will control. *Jennings v. White*, 139—22.

When natural boundary is called for in patent or deed, line terminates at it, however wide of course called for it may be, or however short or beyond distance specified. *Hill v. Dalton*, 140—9.

What controls.—Where there is no evidence to locate first call in deed, but second call may be located, plaintiff may reverse calls in grant and run back to beginning corner. *Lindsay v. Austin*, 139—463.

Bridges.

See County Commissioners, contracts.

Briefs.

See Appeal, assignment of errors.

Broker.

See Principal and Agent.

BUILDINGS.

Construction.—In action for fire caused by stove pipe being run through ceiling, proper to charge that if work was constructed by competent builder, of safe material, in safe manner, was not negligently permitted to become defective, maintenance of flue was not negligence, even if it caused fire. *Fowle v. R. R.*, 147—502.

BURDEN OF PROOF.

BURDEN OF PROOF.

Distinction between burden of issue and burden of proof. Board of Ed. v. Makely, 139—30.

In injunction, findings of fact by judge not conclusive on appeal, but judgment presumed to be correct, and burden is upon appellant to show error. Hyatt v. DeHart, 140—270.

Plaintiff in ejectment must recover, if at all, upon strength of his own title. Rumbough v. Sackett, 141—495.

Party claiming land to be within exception must take the burden of proving it. Lumber Co. v. Cedar Co., 142—412.

When answer admits facts which entitle plaintiff to recover, it is immaterial how or in what manner the admission is made. If by confession and avoidance, issue arises upon new matter alleged in avoidance, burden being upon defendant to show truth of new matter. Eames v. Armstrong, 142—507.

In action on life policy, presumption is against suicide and burden is on party who seeks to establish it. Thaxton v. Ins. Co., 143—34.

In action for abuse of process, plaintiff must show an ulterior purpose, and an act in the use of process not proper in regular prosecution of proceeding. R. R. v. Hardware Co., 143—55.

In processioning proceeding, burden is upon plaintiff to establish line contended for by him. Woody v. Fountain, 143—71.

See, also, Green v. Williams, 144—60.

Where evidence and verdict shows title of one who negotiated check was defective, burden is upon him to show that he was a purchaser in good faith, for value and without notice. Mfg. Co. v. Summers, 143—103.

In proceeding for probate of will, on margin of which was an alleged revocation, after its due execution is proved, burden is upon contestant to show legal revocation. In re Shelton's Will, 143—218.

In action for burning, if fire was

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set by engine, burden is on defendant to show that it was equipped with proper spark arrester. Lumber Co. v. R. R., 143—324.

In action for damages on account of message ordering "four gallons of corn," sender's name being erroneously transmitted, plaintiff must show that sendee was deceived by error and that he understood that corn whiskey was intended. Newsome v. Tel. Co., 144—178.

Doctrines of "burden of proof," "burden of issue," and "prima facie case," discussed and distinguished. Overcash v. Electric Co., 144—573.

Where means of proof are under control of one, burden is upon him to show facts. Watson v. R. R., 145—239.

Mortgagee who purchases equity of redemption direct from mortgagor must show that it was entirely fair. Hauser v. Morrison, 146—251.

Burden of proof is upon plaintiff to attack defendant's grant for any cause not appearing upon its face. Weaver v. Love, 146—416.

Burden of proof upon him who claims verbal chattel mortgage, is by greater weight of evidence. Odom v. Clark, 146—549.

Burden of issue does not shift, but burden of proof may shift from one party to the other, depending upon state of the evidence. When the burden of proof shifts from the party originally bearing it other party is not required to disprove it by preponderance of evidence. Winslow v. Hardwood Co., 147—276.

If the plaintiff proves a fact which raises a prima facie or presumptive case of negligence or which entitles him to have the issue submitted to the jury, burden of proof may shift to the defendant, but he is not required to make the evidence preponderate in his favor. Ibid, 147—278.

Placing of burden of proof is in legislative power, even in criminal cases. Burns v. Tomlinson, 147—635.

Refusal to charge that upon the whole evidence jury will answer an issue for defendant, upon whom

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rests the burden of proof, is proper, and while prayer was not in proper form, it deprived jury of right to pass upon credibility of witnesses. *Hawk v. Lumber Co.*, 149—17.

Where defendants executed and delivered note and mortgage, now the property of plaintiff, evidence of execution and assignment by endorsement to plaintiff being admitted, this would make a prima facie case and burden would be on defendants to discharge themselves from liability. *Haines v. Smith*, 149—280.

Proofs of loss, though not conclusive and irrebuttable by plaintiff, are prima facie true as against him. Burden is upon him to show that statement made in proofs was erroneous in fact, not merely that he made his affidavit as a conclusion from hearsay evidence. *Hill v. Ins. Co.*, 150—4.

Proof required to be shown by propounder of will for probate in solemn form, stated. *In re Hedgepeth*, 150—251.

Adverse possession.—Possession under color of title must be continuous, uninterrupted, and manifested by distinct acts of ownership to bar entry of one shown to be real owner; and when title is claimed by adverse possession, burden is on him who relies on such claim to show continuous possession. There is no presumption that possession is adverse. *Bland v. Beasley*, 145—169.

Burden of showing title by adverse possession is upon those who claim land for 20 years. *Mott v. Land Co.*, 146—527.

Breach of contract.—In action for wrongful discharge, burden upon plaintiff to show contract, discharge and damages. *Eubanks v. Alspaugh*, 139—520.

Burden of justification is upon defendant, when contract and wrongful discharge shown. *Ibid*, 139—520.

Where answer admits breach of specific contract, plaintiff must show performance, or that other

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party prevented him. *Tussey v. Owen*, 139—457.

In action to recover for services, burden is upon defendant to show good cause for discharge, and if plaintiff failed to perform his duty, defendant had right to discharge him, and if he performed his part of contract and did not withdraw from service, jury should find that he was wrongfully discharged. *Ivey v. Cotton Mills*, 143—190.

Fraud.—In action for fraud, burden is upon plaintiff to show alleged fraud by testimony clear, cogent, and convincing. *Griffin v. Lumber Co.*, 140—515.

Burden is upon insurer to show how it came in possession of policy, when it disappeared from her possession shortly prior to death of insured and not upon beneficiary that it was obtained by fraud. *Lanier v. Insurance Company*, 142—15.

Burden of proof to show transaction to be fair and honest where grantee in alleged fraudulent deed was agent, confidential friend and adviser of grantor. *Smith v. Moore*, 142—278.

In action to set aside deed made by defendant, commissioner appointed to sell land for partition, made to his co-defendants, burden is upon plaintiff to show fraud by a preponderance of the evidence only. *Tuttle v. Tuttle*, 146—485.

Mental incapacity of grantor and fraud and undue influence of grantee need only be shown by greater weight of evidence. *Fraleigh v. Fraleigh*, 150—503.

That deceased grantor in deed was a colored man about 70 years old, and boarded with grantee, whom he desired to marry, to be taken care of, thus living in a lawful manner, is not such a relationship between them as will affect the rule that burden is upon heirs who seek to set aside deed for fraud and undue influence. *Whitlock v. Dixon*, 150—618.

Insanity.—The fact that one has "spells," during which his mind was affected, does not relieve plaintiff

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of burden of showing insanity. *Hudson v. Hudson*, 144—454.

Sanity is generally presumed until contrary be proved. If a general derangement be once established, the burden is shifted to the other side and sanity is then to be shown at time act was done. *Ibid*, 144—453.

In action to set aside deed for want of mental capacity, grantor had attacks, prior and subsequent to its execution, which deranged her, plaintiff must show that she had sufficient capacity at time of execution of deed. *Ibid*, 144—449.

Insurance.—Where certificate of insurance and death is shown, burden is on defendant to show non-payment of dues or other matter to avoid policy. *Wilkie v. Natl. Council*, 147—638.

Peculiar knowledge of facts.—When a particular fact, necessary to be proved, rests particularly within the knowledge of one of the parties, upon him rests the burden of proof. *Furn. Co. v. Express Co.*, 144—645.

Penalty.—In action against register of deeds under revisal Sec. 2088, burden is upon plaintiff to show that defendant knowingly or without reasonable cause issued license. *Furr v. Johnson*, 140—157.

In action for penalty under ranging act, burden upon defendant to show estate in land of a year or more, and their bona fide claim to title not sufficient. *Rose v. Davis*, 140—266.

Privileged communication.—Burden of showing that communication was privileged is upon him who claims the privilege. *Logan v. Hodges*, 146—43.

Title.—In claim of title by right of entry on vacant land, it is unnecessary that protestant make out a perfect chain of title, with no link unbroken, as in ejectment. *Lumber Co. v. Coffey*, 144—560.

Burden of proof is upon party who substantially asserts the affirmative of the issue, and this

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means the substance and not merely the form of the issue, whether the party be nominally plaintiff or defendant. *Walker v. Carpenter*, 144—675.

In action upon an entry upon vacant lands, burden is upon enterer or claimant, to show that land was described in his entry. *Ibid*, 144—676.

In absence of proof, court will assume that entry and survey conform to statute and burden upon plaintiff to show prior entry invalid. *Frasier v. Gibson*, 140—272.

Claimant of land under "Hertford County Act" having perfect chain of deeds but without perfect title, must also show that he owns title. *Mitchell v. Garrett*, 140—397.

Where protest is filed against entry upon vacant land, enterer must make good his right as against protestant only. *Bowser v. Wescott*, 145—60.

Where protestants to entry upon State's land are in possession of locus in quo, but fail to connect their title with those under whom they claim, it is no admission of absence of title and protest should not be dismissed as against subsequent enterer. *Ibid*, 145—56.

BURNT AND LOST RECORDS.

Plaintiff claimed title under deed to his ancestor, and adverse possession. Defendant put in evidence record of proceedings to restore burnt or lost record. Plaintiff is not estopped from proving title, or from showing its true boundaries, and judgment can have only force and effect of original conveyance if latter had not been destroyed but had itself been in evidence. *McNeely v. Laxon*, 149—334.

Canal.

See Damages, generally; Rivers and Streams.

Cancellation.

See Deeds, cancellation.

CARRIER.

CARRIER.

As insurer of goods.—Carrier of goods can only relieve himself of his common law liability as insurer for loss or damage, not resulting from his negligence, by a contract reasonable in its terms and founded upon valuable consideration. *Marable v. R. R.*, 142—562.

Carrier is not insurer of merchandise delivered to it by passenger as personal baggage, without notice of contents. *Brick v. R. R.*, 145—205.

There is no contract for carriage, and carrier is liable only as gratuitous bailee where goods, not personal baggage, are offered for carriage, and the fact is not made known, or notwithstanding are accepted for carriage. *Ibid*, 145—206.

Bill of Lading.—Holder of draft or bill of exchange, who takes an attached bill of lading by assignment or otherwise as security for amount advanced on draft, becomes owner of goods as against acceptor to an extent sufficient to secure and protect his claim, but it does not impose upon him the burden of making good a contract as to the goods between consignor and consignee. *Mason v. Cotton Co.*, 148—499.

Holder of negotiable instrument with bill of lading attached, under circumstances indicated, was by right superior to that of a consignee who had accepted and paid draft drawn on him for the purchase price of the goods. *Ibid*, 148—499.

In action for penalty for delayed shipment, it was represented to defendant that goods had been loaded in its car, for which it issued a bill of lading, whereas in fact the goods were not loaded, carrier is not bound by bill of lading and burden is upon plaintiff to prove car was loaded according to bill. *Peele v. R. R.*, 149—393.

Delivery of Freight.—When goods are shipped to place where there is a side track, but no depot platform or agent of the carrier, and this is known to the parties, leaving car of goods upon side track is

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a good delivery. *Reid v. R. R.*, 149—426.

Failure to deliver freight shipped from Baltimore to Durham is not an interstate matter and where transportation is completed and delay occurred in warehouse in Durham, Rev. 2633 applies. *Hockfield v. R. R.*, 150—422.

Discriminations.—Common carrier must serve the public without discrimination and sell its tickets and accommodations in the order of application. *Patterson v. Steamship Co.*, 140—412.

Where higher charge was paid than was charged other shippers, payment is not considered voluntary and excess may be recovered, though not protested. *Lumber Co. v. R. R.*, 141—171.

Amount overpaid on freight shipment draws interest. *Ibid*, 141—171.

In action to recover for overcharges in freights, complaint need not set forth dates of shipments, nor dates when defendant charged others lower rates. *Ibid*, 141—171.

In action to recover for overcharges of freight, evidence as to interstate shipments, competent. *Ibid*, 141—172.

Competent to show that others were paying less than plaintiff for same service, under similar circumstances. *Ibid*, 141—172.

Where carrier requires payment of charges upon entire shipment, though part of it is short and not delivered, constitutes overcharge under Rev. 2641, for which penalty lies. *Cottrell v. R. R.*, 141—383.

In action for recovery of penalty for overcharge, error for judge to charge that tariff rate published between two points for freight moving in opposite direction to that of shipment in question was conclusive. *Scully v. R. R.*, 144—180.

Penalty for refusal to refund overcharge in freights is proper, though itemized statement, with paid freight bill and bill of lading in two separate and distinct cases be filed together. *Eftand v. R. R.*, 146—133.

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Statute regulating charges by railroad and other companies for failure to return overcharge wrongfully made, applies to all companies or persons engaged as common carriers and does not discriminate against defendant by excepting firms and individuals engaged in same service. *Ibid*, 146—135.

Railroad company has no right to issue an embargo upon one or more of its patrons and refuse to carry or receive any freight from him, and it is indictable to unjustly discriminate between members of the public. *Garrison v. R. R.*, 150—584.

Freight Rates.—Where lease of railroad property provided that lessee would not during continuance of lease fix a higher average freight rate than was established by lessor at time, and no forfeiture clause annexed, failure to comply with covenant does not work a forfeiture, but lessor may sue on covenant for its breach. *Hill v. R. R.*, 143—540.

Law presumes that carrier has complied with Acts of Congress and orders of Interstate Commerce Commission in publishing rates to and from points on its road. *Reid v. R. R.*, 150—764.

Limiting Liability.—Measure of damages to shipment of car-load of perishable goods, caused by defendant's negligence, is net value at destination, after deducting commissions and cost of sale, and stipulation in bill of lading that such should be the value of the goods at place of shipment is void. *McConnell v. R. R.*, 144—88.

Carrier cannot by any stipulations in bill of lading contract to limit its liability for negligence in transportation of goods which it receives for carriage. *Ibid*, 144—90.

Stipulation in shipping contract that in case of loss or damage carrier shall not be liable beyond a fixed value agreed upon, is valid, when freely and fairly entered upon and when stipulation as to value is reasonable or based upon valuable consideration and is not an evasion of its liability for negligence. *Jones v. R. R.*, 148—586.

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Rights of Consignor.—Where plaintiff, consignor, contracted to deliver goods to consignee, plaintiff is entitled to recover the identical goods from defendant, and if it has converted them or they are lost, their value and interest. *Box Factory v. R. R.*, 148—422.

Notice of Arrival of Shipment.—Liability of common carrier continues until notice is given consignee of arrival of shipment at destination and reasonable time given to remove it. Thereafter carrier's liability is that of warehouseman. *Poythress v. R. R.*, 148—395.

Notice given by carrier of arrival of goods to transfer company, who usually hauled consignee's goods from depot, is not sufficient when transfer company was not told to haul these goods, and plaintiff repeatedly applied in person for same. *Hockfield v. R. R.*, 150—421.

Order—Notify Shipment.—Consignor who has shipped goods to his order may divert shipment from its original destination, though directions are given to notify a proposed vendee, but not when bill of lading has been endorsed and sent with draft attached, to proposed vendee, who had paid draft. *Development Co. v. R. R.*, 147—505.

Perishable Goods.—Railroad must furnish suitable cars for perishable goods accepted for shipment. *McConnell v. R. R.*, 144—87.

When railroad accepts perishable goods for shipment, and does so under contract with refrigerator company, whereby latter company was to furnish cars and do the "icing," former company to handle such cars in course of its business, railroad is liable to shipper for damages caused by neglect to do "icing," shipper having no knowledge of contract, and holding bill of lading of railroad company, he having to show negligence only. *Ibid*, 144—87.

Terminal Charges.—A general custom in regard to terminal charges, in addition to freight charges, is a part of contract, and

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in absence of express stipulation to contrary, wharfinger may recover of consignee reasonable and customary charges at port of delivery. *Riddick v. Dunn*, 145—31.

Carrier cannot recover warehouse charges on goods it wrongfully refused to deliver. *Hockfield v. R. R.*, 150—422.

While carrier is required to receive and transport freight, its patrons have no right by refusing or failing to receive freight to so monopolize the car tracks, etc., as to prevent or interfere with it in the discharge of its duty to the public. *Garrison v. R. R.*, 150—585.

Title Under Bill of Lading.—Consignor who has shipped goods to his order may divert shipment from its original destination, though directions are given to notify a proposed vendee, but not when bill of lading has been endorsed and sent with draft attached, to proposed vendee, who had paid draft. *Development Co. v. R. R.*, 147—505.

When carrier delivers goods without production of bill of lading, it is liable in trover for their value to bona fide holder of such bill, taken for value before delivery of goods at destination, even where it delivered goods to shipper at intermediate point. *Ibid*, 147—506.

Warehouseman.—When goods arrive and charges are paid, defendant is warehouseman and not common carrier, and liable for only ordinary care. *Stone v. Steamship Co.*, 139—193.

Neither usage nor custom, as general rule, will sanction or excuse an act which law condemns as negligent. *Ibid*, 139—195.

Where shipment of stock was unloaded and placed in stable by carrier, awaiting arrival of owner, and one mule appeared to have been trampled and bruised, liability of carrier continued for reasonable time after actual transportation ceased. *Jones v. R. R.*, 148—582.

Warehouseman to use ordinary care when liability as common car-

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rier ceases. *Trouser Co. v. R. R.*, 139—382.

Liability of common carrier continues until notice is given consignee of arrival of shipment at destination and reasonable time given to remove it. Thereafter carrier's liability is that of warehouseman. *Poythress v. R. R.*, 148—395.

Cartway.

See Roads and Streets, gen.—
Eminent Domain, gen.

Case.

See Appeal, case on appeal.

Cattle.

See Railroads, injury to stock.

CAUSES.

Joinder of.—Causes for damage and trespass cannot be joined in condemnation proceeding. *Abernathy v. R. R.*, 150—107.

Caveat.

See Wills, caveat.

CAVEAT EMPTOR.

Caveat emptor does not apply where there is actual fraud. *Griffin v. Lumber Co.*, 140—518.

When purchaser undertakes to make investigation of his own, and seller does nothing to prevent it from being as full as he chooses to make it, purchaser cannot afterwards allege that vendor made misrepresentations. *Williamson v. Holt*, 147—524.

Where plaintiff, a machinist, examined an ice plant before buying it, and knew that plant had been a failure, he is liable in action for purchase money, even though exaggerated statements as to what plant might do were made to him, and partially influenced the sale. *Ibid*, 147—521.

CEMETERIES.

Disturbing.—Where deed granting right of way prohibits entry upon burial ground, etc., but no

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part was so used at the time, right to use not interfered with though land appropriated to such use since. *R. R. v. Olive*, 142—258.

CENSUS.

List.—Census list competent only to prove facts of public nature. *Campbell v. Everhart*, 139—504.

CERTIORARI.

When Granted.—Certiorari lies where case "settled" has been docketed and it appears by affidavit that record has been misplaced, without laches on part of petitioner. *Slocomb v. Const. Co.*, 142—349.

It is duty of appellant to docket "record papers" in apt time and upon call of district ask for certiorari where "case" not settled in time. *State v. Telfair*, 139—555.

Cestui Que Trust.

See Trusts.

Challenge.

See Jury.

CHAMPERTY AND MAINTENANCE.

Contract "to do everything proper and legitimate, and to aid them in every way to recover said estate; that he will give all and true evidence, etc.," is not void as being champertous, and especially where one has an interest in the estate or acts in the bona fide belief that he has. *Smith v. Hartsell*, 150—77.

Character.

See Evidence, character; Witness, character.

Charters.

Construction of.—If grant is to city for purpose of private emolument, though public derives common benefit therefrom, city is regarded as private company. *Fisher v. Newbern*, 140—506.

CHURCH.

Public grants are strictly construed; nothing can be taken against the State by presumption or inference. *Pedrick v. R. R.*, 143—500.

Chattel Mortgage.

See Mortgage, chattel.

CHEROKEE LANDS.

Code provision that failure to pay purchase money for land entered, within prescribed time, works a forfeiture, does not apply to Cherokee Lands. *Frasler v. Gibson*, 140—272.

In action by enterer of Cherokee Lands, cause barred in ten years from registration of grant. *Ibid*, 140—272.

A status is established between State and enterer of Cherokee Lands, by which he becomes a purchaser; the enterer of other lands acquires a mere option to buy. *Ibid*, 140—272.

Entry upon Cherokee Lands, when not lapsed. *Ibid*, 140—272.

A mere enterer is not entitled to an injunction to restrain another claimant from cutting timber. *Ibid*, 140—277.

CHILD EN VENTRE SA MERE.

Upon death of father seized of lands, wife then being enceinte, inheritance immediately vests in child en ventre sa mere. *Deal v. Sexton*, 144—157.

Vendee of purchaser for value, of land at sale by partition, takes subject to interest of child en ventre sa mere, not a party to proceedings by guardian, whether vendee had any knowledge of it or not. *Ibid*, 144—157.

Children.

See Negligence; Children; Heirs, generally; Parent and Child.

CHURCH.

Churches have right to appoint trustees to hold its property, etc., but Revisal 2670-1 does not apply to property held by it in trust. *Thornton v. Harris*, 140—498.

CHURCH.

Clerk of court authorized to appoint successors, upon death of last survivor of church board of trustees. *Ibid*, 140—498.

Court will not restrain officers of church from leasing small portion of lot for store purposes on ground of breach of trust, though lot conveyed for church purposes. *Hayes v. Franklin*, 141—599.

Specific trust will not be superimposed upon title conveyed to religious congregation, authorizing court to control their management of it, unless this is clear intent of grantor. *Ibid*, 141—599.

CITIZENS.

Who are.—Cherokee Indians in North Carolina are citizens of this State and bound by its laws. *State v. Wolf*, 145—444.

One who leaves the State for the purpose of evading judgment in criminal action against him, and his whereabouts are unknown, is not entitled to exemptions. *Cromer v. Self*, 149—167.

CLAIM AND DELIVERY.

Claim and delivery only lies against one who has possession of property at time action is instituted. *Bowen v. King*, 146—389.

Old action of replevin, or claim and delivery now, lies to recover deeds, certificates of stock and the like when object of action is to regain possession of specific papers and not to test right or title to property which they represent. *Bridgers v. Ormond*, 148—377.

Where contract for sale of lumber provided that title should vest in plaintiff upon advancement of certain sums, contract was executory till payments were made, or, at least, performance with readiness and ability tendered and refused. *Coles v. Lumber Co.*, 150—186.

CLERK.

Orders of.—Superior court may at any time, during progress of trial, remove guardian ad litem for

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cause. *Carraway v. Lassiter*, 139—145.

Upon order to produce papers before clerk, respondent not required to deposit papers in clerk's office. *Mills v. Lumber Co.*, 139—524.

Administrative order of court not res judicata. *Ibid*, 139—524.

Clerk of court authorized to appoint successors, upon death of last survivor of church board of trustees. *Thornton v. Harris*, 140—498.

Cloud Upon Title.

See Title, cloud upon.

Codicil.

See Wills.

Collateral Attack.

See Evidence, collateral attack; Judgment, generally.

Collateral Security.

Bank entitled to retain necessary disbursements out of collaterals, to loan, where it comes into court to defend validity. *Lumber Co. v. Pollock*, 139—174.

Bank holds collaterals as trustee and its duty is to protect them. *Ibid*, 139—174.

When creditor takes note of third person as collateral for his debt, he is bound to use due diligence to collect collateral. *Ibid*, 139—174.

In contract to assign accounts as collateral security, what passes. *Chemical Co. v. McNair*, 139—326.

Where defendant receives payment of accounts secured by lien bonds assigned to plaintiff, he may recover. *Ibid*, 139—326.

Contract to sell guano and hold lien bonds as collateral security, effect of. *Ibid*, 139—326.

Collectors.

See Executors and Administrators.

COLOR OF TITLE.

What Constitutes.—Color of title is a paper writing which appears to

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pass title, but fails to do so. *Smith v. Proctor*, 139—314.

"Connor Act" does not extend to a claim of adverse possession. *Janney v. Robbins*, 141—400.

Evidence sufficient to ripen color of title. *Wall v. Wall*, 142—388.

Unregistered deed competent to show color of title. *Allen v. Burch*, 142—528.

Tax title conveying life estate, under Act of 1874, not color of title against remainderman, nor is possession adverse till death of life tenant. *Smith v. Proctor*, 139—314.

Defendant in ejectment has grant from State, plaintiff failed to show title out of State or color of title, error in refusing to non-suit. *Lindsay v. Austin*, 139—463.

Deed made by husband and wife is not "color" of title when certificate does not show that husband acknowledged its execution, or that privity examination of wife had been taken, it not appearing that it was offered as a common-law deed for purpose of color. *Cook v. Pittman*, 144—530.

One cannot acquire title by an ouster followed by seven years possession under color of title, unless description in deed under which he claims covers locus in quo. *Fincannon v. Sudderth*, 144—587.

Under Revisal 1580, trustees are seized as joint tenants, and if one is barred of his entry, co-trustees are equally so, and where there is an ouster of life tenant under deed made by one of them as commissioner, to third party, such deed is color of title. *Webb v. Borden*, 145—188.

Junior grant covered by prior grant conveys no title, but is color of title, and title being out of State by plaintiff's prior grant, seven years adverse possession by defendants ripened their color of title, except as to those plaintiffs protected by coverture or infancy. *Weaver v. Love*, 146—417.

Revisal 1699, providing that junior grant shall not be color of title so far as it covers land previously granted, applies only to

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grants issued since March 6, 1893. *Ibid*, 146—417.

When purchaser of land at foreclosure sale enters into possession under deed of definite description, it is color of title in him and those claiming under him, and becomes indefeasible at expiration of seven years adverse possession. *Sutton v. Jenkins*, 147—12.

A tax deed, regular upon its face, is "color" of title, though sheriff failed to bid in land sold for taxes when no one would pay tax for less number of acres than the whole. *Greenleaf v. Bartlett*, 146—495.

Mortgage conveys legal title, and mortgagee in possession necessarily has color of title at least, and when he conveys by deed to defendants who hold under known and visible lines and boundaries seven years, possession ripens title. *Stewart v. Loudermilk*, 147—584.

If junior grantee has been in adverse and continuous possession of lappage for seven years prior to bringing of action, and senior grantee has not been in actual possession of any part thereof, junior grantee has title, and lappage is regarded as separate and distinct tract and color will ripen perfect title by sufficient adverse possession. *Currie v. Gilchrist*, 147—652.

When there are two claimants to land under different deeds, which include a part of land in both, there is color of title in junior grantee, and if he can show adverse possession for seven years, it will bar right of entry of other party. *Ibid*, 147—652.

Report of commissioners, confirmed and ordered to be recorded in clerk's office, and registered as required by statute is color of title. *Hill v. Sane*, 149—272.

Statute of limitations does not begin to run against a married woman, in adverse possession of lands under color for required time, by ouster of a part thereof during her coverture, or, after her death, against her heirs during continuous adverse possession of hus-

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band as tenant by courtesy. *Ibid*, 149—272.

Comity.

See Conflict of Laws.

COMMISSIONERS.

Duties of.—A commissioner appointed to sell land for partition, cannot lawfully, directly or indirectly, purchase at his own sale or speculate in the land for his own benefit. *Tuttle v. Tuttle*, 146—486.

Commissioner to sell land for partition cannot extend or change boundaries contained in decree, but he may make more specific and certain the description of land sold by him. *Bailliere v. Shingle Co.*, 150—634.

Report of.—Judge's instructions to new commissioners, when set aside. *Hawk v. Hall*, 139—179.

Setting aside report of commissioners for indiscretion, supreme court will not reverse. *Ibid*, 139—179.

Report of commissioners in division of land, presumed to have been duly recorded in clerk's office in accordance with order of court, in absence of proof to contrary. *Hill v. Lane*, 149—271.

Report of commissioners, confirmed and ordered to be recorded in clerk's office, and registered as required by statute, is color of title. *Ibid*, 149—272.

Exceptions to report of commissioners in partition proceedings should be filed within twenty days after their report is filed, but amended exceptions may be filed after that time, and clerk, upon good cause shown, may extend the time. *McDevitt v. McDevitt*, 150—645.

Common Carriers.

See Carriers; Railroads; Express Companies.

COMMON LAW.

In absence of proof to the contrary, courts of our State will presume the common law to prevail in

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COMPLAINT.

sister State. *Woods v. Tel. Co.*, 148—7.

Statute and common law of sister States are facts to be proven, as any other facts, by party who seeks to take advantage of any difference that may exist between such laws and our own. *Ibid*, 148—7.

COMPLAINT.

One can recover, if at all, only according to the allegations of their complaint. *Millhiser v. Leatherwood*, 140—238.

Where complaint in action on specific contracts fails to allege full performance by plaintiff, proper to amend. *Tussey v. Owen*, 139—457.

Where plaintiff is non-suited, supreme court will not dismiss action because complaint defective, or action barred. *Bonner v. Stotesbury*, 139—4.

Supreme court has power of amendment of pleadings. *Ibid*, 139—4.

Will not exercise power where amendment would, perhaps, present case substantially different from one tried below. *Ibid*, 139—4.

Complaint alleging ownership and wrongful detention may be amended by setting out fraud and deceit. *Joyner v. Early*, 139—49.

Amendment of complaint is in sound discretion of court, and not reviewable. *Ibid*, 139—49.

One plaintiff may submit to non-suit where complaint states no cause of action in his favor. *Pritchard v. Mitchell*, 139—54.

Complaint alleging that plaintiff purchased at commissioner's sale, 416 acres of land, tract contained only 320; cause of action set up. *Peacock v. Barnes*, 139—196.

Complaint alleging mistake in quantity of land, need not aver false or fraudulent misrepresentation. *Ibid*, 139—193.

Upon motion to dismiss for want of service, complaint not properly before the court. *Higgs v. Sperry*, 139—299.

Where complaint avers contract made in Virginia, rights of parties

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determined by those laws so far as same apply. *Hall v. Tel. Co.*, 139—369.

Complaint sufficient in action for failure to deliver telegram. *Ibid*, 139—369.

In action to recover for overcharges in freights, complaint need not set forth dates of shipments, nor dates when defendant charged others lower rates. *Lumber Co. v. R. R.*, 141—171.

Sufficiency of.—Necessary averments in complaint in action to enjoin city from making further payments on paving contract alleged to be an unauthorized act. *Merrimon v. Paving Co.*, 142—540.

In suit to set aside verdict and judgment in former action for fraud, allegation in complaint of fraud and suppression of material evidence alone is insufficient. *Moore v. Gulley*, 144—81.

Not necessary for plaintiff to declare upon statute prohibiting his employment under certain age, when he sets out facts which bring cause within its meaning. *Leathers v. Tobacco Co.*, 144—331.

Demurrer will not be sustained when it can be seen by liberal construction that complaint states a good cause of action. *Wood v. Kincaid*, 144—393.

Where complaint substantially alleges facts showing defendant is liable under a contract, without clearly stating its terms, proper remedy is motion to make pleadings more certain, or where permissible, demurrer to form. *Ibid*, 144—393.

Where plaintiff sets up in his complaint for trespass the deed under which he claims, he cannot claim some other description not included in his deed, without amendment. *Fincannon v. Suderth*, 144—587.

Parol evidence is incompetent to show what would have been alleged in complaint which was never filed, in former action between same parties, so as to repel statute of limitations. *Tomlinson v. Bennett*, 145—282.

CONDITIONS.

A complaint which alleges negligence generally without setting forth with some reasonable degree of particularity the things done, or omitted to be done, by which the court can see there has been a breach of duty, is defective and open to demurrer. *Taylor v. Railway*, 145—406.

Complaint is sufficient when it apprises defendant fully of grievance asserted against him, and injury for which redress is demanded. *Gillikin v. Canal Co.*, 147—41.

If defendant desired complaint to be more specific, he should make motion to that effect. *Ibid*, 147—41.

Complaint alleging that town negligently and unskillfully graded its streets so as to injure plaintiff's ingress and egress to and from his lot, states a good cause of action. *Jones v. Henderson*, 147—123.

When by a liberal construction, complaint is sufficient, defendant may move to make statement of cause of action more specific. *Ibid*, 147—125.

Requisites for complaint in action to restrain purchase by city of water-shed, alleged to create a public nuisance, stated. *Jones v. North Wilkesboro*, 150—650.

When complaint does not state a cause of action, defect is not waived by answering, and defendant may demur ore tenus, and court may take notice of defect *ex mero motu*. *Garrison v. Williams*, 150—676.

Compromise.

See Payment.

CONDITIONS.

Conditions subsequent are not favored in law, as they tend to destroy estates, and if reasonably doubtful whether provision in conveyance was intended as condition subsequent or covenant, it will be held to be latter. *Hill v. R. R.*, 143—568.

Alienation.—In an executory devise, doctrine that conditions in restraint of alienation are void, does

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not apply. *Pitchford v. Limer*, 139—9.

Confidential Communications.

See Privileged Statements.

Confidential Relations.

See Executors and Administrators; Fraud and Mistake.

CONFLICT OF LAWS.

Where husband and wife separated, she living here at time of his death in foreign State, her years support should be allotted from a fund due the husband in this State. *Jones v. Layne*, 144—600.

The fiction of personal property being considered as belonging to the domicile of owner, applies only to distribution of assets of one deceased. *Ibid*, 144—602.

Every power which a corporation exercises in another State depends for its validity upon the laws of the sovereignty in which it is exercised. *Ice Co. v. Ry.*, 144—745.

Conjecture.

See Evidence, generally.

CONSIDERATION.

Valuable.—Release of converted claims is a valuable consideration. *Lipschutz v. Weatherley*, 140—365.

Indulgence, or extension of time for payment, constitutes valuable consideration. *Chemical Co. v. McNair*, 139—326.

Consignee.

See Carriers, Etc.; Railroads, delayed shipments.

Consolidation.

See Action, joinder of causes.

CONSPIRACY.

Acts of Conspirators.—Where two persons are engaged in furtherance of common design to defraud, declarations of each relating to the enterprise are evidence against the other,

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though made in latter's absence. *Henderson Co. v. Polk*, 149—107.

Constable.

See Process, return of.
Process, service by.

CONSTITUTIONAL LAW.

Legislature may give "penalties" either in whole or in part, to whomsoever shall sue for same, but statute giving to informer one-half of fine imposed, unconstitutional. *State v. Maultsby*, 139—503.

Drainage laws constitutional. *Porter v. Armstrong*, 139—179.

Seizure and sale of nets under Acts of 1905, Chap. 292, constitutional exercise of police power. *Daniels v. Homer*, 139—219.

Statute authorizing timber owners to condemn rights of way for private tramways, unconstitutional. *Cozard v. Hardwood Co.*, 139—283.

Voter registered on permanent roll provided by constitution, must register anew to be a qualified voter. *Clark v. Statesville*, 139—490.

Constitution Art. V, Section 2, applies to levy of taxes for general, not special, purposes. *Crocker v. Moore*, 140—430.

School districts are quasi-public corporations, included in term "municipal corporations," as used in Art. VIII, Sec. 7, of Constitution. *Smith v. School Trustees*, 141—143.

Legislature cannot confer upon private corporations power to tax, though it may doubtless create municipal corporations for that especial purpose when not forbidden by constitution to do so. *Ibid*, 141—151.

Rev. 3051 prohibiting discharge of sewage into any stream from which public drinking supply is taken without reference to distance of such discharge from point of intake, constitutional. *Durham v. Cotton Mills*, 141—616.

Statute requiring public roads to be worked by labor, constitutional. No constitutional prohibition against double taxation. *State v. Wheeler*, 141—773.

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Act of legislature will never be declared unconstitutional unless it plainly and clearly appears that it has exceeded its powers. *State v. Baskerville*, 141—812.

Entire constitution should be examined, in case of ambiguity, to determine meaning of any part of it. *Ibid*, 141—812.

Legislature may change the rules of evidence by making possession of prohibitive quantity of intoxicants prima facie evidence of guilty intent, but it cannot do so when the effect is to deprive one of a constitutional right. *State v. Williams*, 146—626.

The constitution is the supreme law of the land, and in no proper legal sense can any act of either department of the government which violates its provisions or exceeds the powers delegated, be the law. *Ibid*, 146—621.

An entry on legislative journal that "bill passed its second and third reading, ayes 39, noes—," indicates a unanimous affirmative vote and is a compliance with Art. II, Sec. 14, of the constitution. *Comms. v. Trust Co.*, 143—110.

Constitution is to be examined with view to ascertaining true intent of each part, and to giving effect to whole instrument. *Collie v. Comms.*, 145—173.

Courts will not go behind ratification of an act to ascertain whether 30 days notice prior to passage of private act has been given. *Cox v. Coms.*, 146—585.

Appointment by governor of members of "Board of Commissioners of Navigation," on March 6, 1907, though term of office commenced April 15, 1907, is valid, and members would at least be de facto officers. *St. George v. Hardie*, 147—92.

An appointment of de facto officers pursuant to law, cannot be questioned collaterally, even in a quo warranto proceeding. *Ibid*, 147—93.

Selection by a commission of persons qualified to act as pilots, is not violation of Art. 1, secs. 7 and 31 of

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our constitution, prohibiting exclusive emoluments or privileges. *Ibid*, 147—96.

Courts never pass upon constitutionality of statutes, except in cases wherein the party raising the question alleges that he is deprived of some right guaranteed by the constitution, or some burden is imposed upon him in violation of its protective provisions. *Ibid*, 147—97.

Compulsory education laws sustained when constitutionality is drawn in question. *Starnes v. Mfg. Co.*, 147—561.

Court will not declare legislative enactment unconstitutional unless it clearly appears to them to be so. *R. v. Comms.*, 148—220.

All charters obtained by legislative enactment are subject to provisions of constitution, Art. VIII, Sec. 1, and may be "altered from time to time or repealed." *Power Co. v. Whitney*, 150—32.

Acts Regulating Revenue.—Cost of maintaining streets to the extent and in the manner required for well order and good government of a town is a necessary expense, and indebtedness incurred for such purpose does not come under prohibition of Sec. 7, Art. VII of constitution. *Hendersonville v. Jordan*, 150—37.

Use of the term "State" or "County" in Art. II, sec. 14, of constitution, includes townships and imposes upon legislature the same limitations upon contraction of debts and imposition of taxes. *Wittkowsky v. Coms.*, 150—95.

An entry on legislative journal that "bill passed its second and third reading; ayes 39, noes" indicates a unanimous affirmative vote and is a compliance with Art. II, sec. 14, of the constitution. *Coms. v. Trust Co.*, 143—110.

Act authorizing and directing state treasurer to deliver certain state bonds, repurchased and held as a cash asset, to payment of a debt against the state, does not require a "yea and nay" vote. *Battle v. Lacy*, 150—574.

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Passage of private act.—Courts will not go behind ratification of an act to ascertain whether thirty days' notice prior to passage of private act has been given. *Cox v. Comms.*, 146—585.

Contingent Remainders.

See Remainders, contingent.

CONTEMPT.

Legislature cannot deprive courts of inherent power to attach for contempt. *Ex parte McCown*, 139—95.

Assault on judge during recess of court, direct contempt. *Ibid*, 139—95.

Indirect contempt instituted by rule to show cause, and respondent may answer, and appeal. *Ibid*, 139—95.

Contempt, kinds of. *Ibid*, 139—100.

Rule for contempt discharged, when. In *re Scarborough's Will*, 139—423.

Upon appeal from clerk in contempt proceedings, judge may allow additional affidavits on hearing before him. *Ibid*, 139—423.

One sentenced to jail as for contempt of court cannot be worked on roads. *State v. Moore*, 146—654.

When injunction has not been served, if the party to be affected has been made aware of its being issued or that it is about to be issued, and knowingly and intentionally violates it, or does an act to render the order of no effect, such person may be attached for contempt of the process. *Davis v. Fiber Co.*, 150—87.

CONTINUANCE.

It is in discretion of trial judge to grant or refuse mistrial and continuance, and action not reviewable. *State v. Hunter*, 143—607.

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In contract to assign accounts as collateral security, what passes. *Chemical Co. v. McNair*, 139—326.

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Contract to sell guano and hold lien bonds as collateral security, effect of. *Ibid*, 139—326.

Contract for money to become due in future, may be assigned and when due, assignee may sue for and recover, in his own name. *Ibid*, 139—331.

Defendant's intestate endorsed plaintiff's note to A., when no personal liability of intestate. *Hicks v. Kenan*, 139—337.

Contract under seal, must be in name of principal and purport to be his deed. In contracts not under seal, question of agency one of intent. *Ibid*, 139—337.

Where complaint avers contract made in Virginia, rights of parties determined by those laws, so far as same apply. *Hall v. Tel. Co.*, 139—369.

Officers and members of corporation cannot evade contract rights by dissolving organization and leave creditors unprovided for. *Perry v. Ins. Co.*, 139—374.

What contracts Board of County Commissioners may make. *Glenn v. Comms.*, 139—412.

Burden of justification is upon defendant, when contract and wrongful discharge shown. *Eubanks v. Alsbaugh*, 139—520.

In action for wrongful discharge, burden upon plaintiff to show contract, discharge and damages. *Ibid*, 139—520.

Law governing cases for breach of contract applies in awarding damages for mental anguish. *Davis v. Tel. Co.*, 139—78.

Contracts and by-laws of incorporated societies, made with reference to general law. *Sherrod v. Ins. Assn.*, 139—167.

Where insurance company retains the right in its charter, and not prohibited by policy, it may cease writing assessment insurance. *Green v. Ins. Co.*, 139—309.

Special contract of employment not affected by defendant's rules, known to plaintiff, that its servants were hired by month and subject to discharge at will. *King v. R. R.*, 140—433.

CONTRACTS.

Where one sued on contract and judgment is uncollectible, no bar to action for damages for deceit. *Machine Co. v. Owings*, 140—504.

Law does not permit one to keep property in possession over a year, without complaint as to quality, and then defend upon ground that goods are not up to contract. *Main v. Griffin*, 141—44.

Employment of counsel to collect back taxes, under ch. 182, laws 1895, without any duration as to time, was, in law, the contract of the then city attorney and terminable at will of either party. *Wilmington v. Bryan*, 141—666.

Rule that written contract may not be contradicted or added to by parol, applies only where entire contract is written. *Evans v. Freeman*, 142—61.

In contracts for personal service, when no time is fixed and no stipulated period of payment made, it may be terminated at will of either party. *Soloman v. Sewerage Co.*, 142—445.

Where alleged illegal transaction has been fully consummated and large expenditures made, benefit of which has been received by corporation and an objecting stockholder, rights of third parties have intervened so that status quo can not be restored, court of equity will interfere only at instance of state. *Hill v. R. R.*, 143—541.

Executory contract made by owner of land with another to cut timber on a certain piece, is a contract of personal employment and vests no interest in the land or standing timber in the employee. *Biggers v. Matthews*, 147—301.

Contract made by majority stockholder without disclosing the fact that he acted as agent of corporation, may be shown by evidence allunde to have been intended as a corporate act. *Watson v. Mfg. Co.*, 147—474.

Order by corporation for machinery signed in its name by its president, is valid, without the corporate seal. *Mershon v. Morris*, 148—51.

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Abandonment.—If one abandons contract, he can only recover by showing some legal excuse for non-performance. *Tussey v. Owen*, 139—457.

In action for services rendered decedent, to be paid for in devise of estate, plaintiff married and removed to another state before death of decedent, contract is abandoned. *Ibid*, 139—457.

In action for cancellation of policy, motive for abandonment of policy irrelevant. *Green v. Ins. Co.*, 139—309.

In action for cancellation of policy, whether plaintiff subsequently secured other insurance in lieu of that abandoned, incompetent. *Ibid*, 139—309.

Acts relied on as abandonment of contract should be clearly proved. *May v. Getty*, 140—310.

Parties to written contract may by parol rescind, or by matter in pais, abandon same. *Ibid*, 140—310.

Facts in this case show rescission and abandonment. *Ibid*, 140—310.

No presumption of abandonment of right to pay or call for deed when vendee is in possession and vendor does not enforce payment. *Hairston v. Bescherer*, 141—205.

One will be deemed to have abandoned his right to contract for sale of lease, the assignment of which was to be with written consent of owner, where he has never applied to owner for such consent. *Burns v. McFarland*, 146—383.

Against public policy.—Contract based upon consideration, for city to locate its city hall and market near plaintiff's property, to enhance its value, not enforceable. *Edwards v. Goldsboro*, 141—60.

Contracts reprobated by public policy will be declared illegal though in that particular instance no actual injury may have resulted to the public. *Ibid*, 141—60.

When parties to illegal contract are in pari delicto, court will not grant relief, though one obtains advantage over other. *Ibid*, 141—60.

Not necessary that illegal transaction be fully executed, to deprive

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one of the right to repudiate and recover money paid thereon. *Ibid*, 141—61.

Law gives no action to a party upon an illegal contract. *Ibid*, 141—72.

Public policy will not permit the courts to enforce a contract based upon an immoral consideration, but will leave the parties to their own devices. *King v. R. R.*, 147—266.

Neither the sale of editorial columns nor services for carrying an election are cognizable in a court of justice as ground of action for a recovery of compensation. *Ibid*, 147—266.

Promise to repay loss sustained in future contract is void. *Burns v. Tomlinson*, 147—647.

When a contract partly valid and partly not, is deliberately separated by the parties into two agreements, one valid and the other invalid, he who is called upon to perform the invalid part, can not be heard to say that the whole is void. *Annuity Co. v. Costner*, 149—295.

In action for price of cider sold by plaintiff's predecessor to defendant, evidence that it was intoxicating and that plaintiff had United States license, was competent. *Vinegar Co. v. Hawn*, 149—356.

Judgment will not be given for price of intoxicating cider, when contract was made here, delivery was to be made here, and actual delivery was had. *Ibid*, 149—356.

Policy delivered upon condition that it would be effective only if advance premium was paid in life time and good health of insured, is not binding when these conditions have not been complied with by him. *Perry v. Ins. Co.*, 150—144.

One may take out insurance on his own life and pay or arrange for payment of premiums himself, unless such arrangement is a mere cloak for a wagering transaction, and this is not within the rule that one who takes insurance upon the life of another must have an insurable interest in his life. *Pollock v. Household of Ruth*, 150—213.

No action lies for seller to re-

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cover from buyer of right to use sulphur fumigating preservative, because forbidden by law, nor for buyer to recover money paid. *Smith v. Alphin*, 150—427.

An agreement to pool stock and control corporation by a voting trust, is contrary to public policy and void. *Sheppard v. Power Co.*, 150—778. See also *Bridgers v. Staton*, 150—218.

Any agreement which separates the beneficial ownership of the stock from the legal title is contrary to public policy and void. *Ibid*, 150—779.

The law will not lend its aid where contract appears to have been entered into by both contracting parties for express purpose of carrying into effect that which is prohibited by law. *Ibid*, 149—357.

Contract "to do everything proper and legitimate, and to aid them in every way to recover said estate; that he will give all and true evidence," etc., is not void as being champertous, and especially where one has an interest in the estate or acts in the bona fide belief that he has. *Smith v. Hartsell*, 150—77.

Assignment.—Order or request to pay money due plaintiff is not an assignment but a request to pay money, and when not accepted is revocable and only binding on plaintiff to extent that money was paid in compliance with his request. *Ives v. Lbr. Co.*, 147—308.

Contract to cut and deliver given number of cords of wood is assignable. *R. R. v. R. R.*, 147—380.

The restriction in assignment of contracts ordinarily arises for benefit of other party thereto, and where such party assents to and ratifies the assignment it will be upheld. *Ibid*, 147—368.

Where a contract was assigned to one's lessee, who broke the terms of it so that action was brought and recovery had against the original party or lessor, he having been forced to pay can recover of lessee the amount of this enforced recovery. *Ibid*, 147—386.

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Where defendant had taken over contract made by others with plaintiff and had expressly agreed with him to fully perform it, and had failed to comply with such agreement, action lies. *Younce v. Lbr. Co.*, 148—36.

Bond for title.—Where vendor placed vendee in possession of land under contract to buy, deed to be executed on certain day, the relation of mortgagor and mortgagee exists and vendee can not be foreclosed of his rights, upon default in payment, by vendee's selling to another. *Freeman v. Bell*, 150—149.

When under agreement of lease of lands, containing also a contract to convey upon payment of stipulated rental for certain time, and lessor treats lease as continuing after default, he is entitled to lien for rent; but when he seeks to resume possession, lessee can assert his equity under contract to convey, cause land to be sold and pay balance of purchase money. *Hicks v. King*, 150—371.

Breach of.—Measure of damages for breach of contract in failing to deliver goods having market value. *Hosliery Co. v. Cotton Mills*, 140—452.

If both parties break contract, neither can sue the other for its breach. *Hughes v. Knott*, 140—551.

Upon breach of contract, one is liable for gains prevented and such losses sustained that fairly entered into contemplation when contract was made. *Machine Co. v. Tobacco Co.*, 141—284.

Four remedies given servant wrongfully discharged, when contract entire, and to be paid in installments. *Smith v. Lbr. Co.*, 142—26.

Failure of employee to seek other employment after wrongful discharge, competent only in diminution of damages. *Ibid*, 142—27.

Where one is employed for a certain time and is wrongfully discharged before then, he is generally entitled to full wages for whole time. *Ibid*, 142—34.

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In action on breach of contract, evidence that plaintiff borrowed money so that he could fulfill his contract, competent upon issue as to his ability to perform. *Ives v. R. R.*, 142—131.

In cases of contract, injured party should do whatever he reasonably can to lessen injury. *R. R. v. Hardware Co.*, 143—54.

See also to same effect *Tillinghast v. Cotton Mills*, 143—268.

In action for breach of contract for sale of yarn, measure of damages is difference between contract price and market value at time when and place where goods should have been delivered under terms of contract. *Tillinghast v. Cotton Mills*, 143—268.

Where one seeks to recover special damages for breach of contract, arising by reason of special circumstances, he must show that defendant, at time contract was entered into, had knowledge of them and it could be inferred they were contemplated as affecting question of damages. *Ibid*, 143—269.

In action upon breach of contract for exhibition of machine by defendant, only costs and expenses that plaintiff may have actually incurred in making the exhibit are recoverable. *Machine Co. v. Tob. Co.*, 144—421.

In action for breach of contract of sale, if such be proved, nominal damages are at least recoverable. *Mfg. Co. v. Machine Co.*, 144—689.

See also: *Clothing Co. v. Stadiem*, 149—8.

In action for breach of warranty as to sawmill machinery, purchaser can not recover for loss of profits in lumber contracted to be sold if contract was not known to seller. *Ibid*, 144—691.

In action for breach of contract for sale of perfect machine, where defendant declined to receive machine and promised to repair it, which was done, measure of damage is extra expense incurred while trying imperfect machine and such damages as were reasonably con-

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templated when contract was made. *Ibid*, 144—689.

In absence of fraud in procuring execution of contract, parties are generally left to pursue their remedy for damages for its breach, where, in the nature of the transaction they afford adequate compensation. *Braddy v. Elliott*, 146—581.

Where defendant wrongfully took possession of plaintiff's logs and sold them and received the money, plaintiff may waive the tort and sue for money; or e converso, when breach of contract involves a tort, one may waive contract and recover for tortious injury. *Manning v. Fountain*, 147—19.

Action against owner, who has failed to convey lot to purchaser procured by agent, may not be changed to one in tort and an amount in addition to commissions added as damages. *Realty Co. v. Corpening*, 147—614.

Current profits of going manufacturing enterprise, dependent on varying cost of labor and materials and fluctuations of market value of material, generally too uncertain to form basis of award of damages for breach of contract affecting operation of plant, and where substantial damages are recoverable they are ascertained on basis of interest on capital invested which is unproductive for time, pay of hands idle and necessarily unemployed, and incidentals reasonably referable to defendant's wrong. *Furn. Co. v. Express Co.*, 148—89.

Where defendant bought plaintiff's interest in mill, upon representation that debts would not exceed a given amount, that mill was largely indebted, that the statement induced the trade, and it was accepted and relied upon, it would constitute a warranty. *Wrenn v. Morgan*, 148—106.

If vendee refuses to pay for and receive goods, vendor may either rescind the contract or resell the goods and recover from vendee the difference in price, and for this purpose he acts as agent for vendee

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and must use diligence and utmost good faith. *Clothing Co. v. Stadlem*, 149—8.

In action of vendor to recover for breach of contract for purchase of goods, he may recover storage and interest on purchase price while making reasonable and proper efforts to sell goods. *Ibid*, 149—8.

Present and prospective damages should be assessed for breach of contract, the measure of damage being value of contract at time of breach. *Hawk v. Lbr. Co.*, 149—13.

In action for breach of contract, evidence of subsequent increased cost of labor, to diminish profits during period of time required to fulfill contract, is incompetent. *Ibid*, 149—13.

Measure of damages for breach of contract, stated. *Wilkinson v. Dunbar*, 149—22.

Profits of an old established business may sometimes be allowed as damages, when they can be ascertained with a reasonable degree of certainty, and, under like circumstances, the prospective profits to arise from the contract declared on are also recoverable. *Ibid*, 149—22.

Where lease of railroad property provided that lessee would not during continuance of lease fix a higher average freight rate than was established by lessor at time and no forfeiture clause annexed, failure to comply with covenant does not work a forfeiture, but lessor may sue on covenant for its breach. *Hill v. R. R.*, 143—540.

If one is under contract obligation to remove lumber from yard at given time, and fails to do so, in absence of any special circumstances entering into contract, he is liable for fair rental value of use of yard. *Coles v. Lbr. Co.*, 150—188.

For breach of ordinary business contract, jury should be given some measure of damages for their guidance, and not to give "whatever they found to be a reasonable allowance." *Coles v. Lbr. Co.*, 150—190.

In ascertaining value of use of

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lumber yard caused by plaintiff's breach of contract to receive lumber, testimony as to use to which defendant could have put it, etc., is relevant. *Ibid*, 150—191.

Measure of damages for failure to receive lumber under contract, is difference between contract price and what it cost to cut and place lumber on yard, that is, the profit on lumber, subject to a reduction of such profit, if any, as defendant made by selling to some other person. *Ibid*, 150—191.

Entire damages arising from breach of implied covenant that leased premises should be open to entry of lessee at fixed future time, should be recovered in one and same action. *Sloan v. Hart*, 150—274.

Where one has a contract of employment for a year and is wrongfully discharged before then, he would be entitled to such damages less what he might have earned up, on reasonable effort. *Currier v. L. I. R. Co.*, 150—694.

In action for exemplary damages for alleged willful failure to comply with contract to run excursion for plaintiff, and jury found under competent evidence that defendant was not guilty of any breach of duty, this puts an end to the action and question of punitive damages can not arise. *McColman v. R. R.*, 150—709.

Building.—Where contractor failed to complete plaintiff's house according to contract, when surety to contract not liable. *Donlan v. Trust Co.*, 139—212.

Plaintiff not entitled to attorney's fees in suit against surety to building contract. *Ibid*, 139—212.

Lien is given upon property of married woman for all debts contracted for work and labor done. *Ball v. Paquin*, 140—83.

Contract for labor and material for dwelling on wife's land, sufficient to charge her estate. *Ibid*, 140—83.

Work done and furnishing material in house, all in the same entire

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contract, contractor entitled to lien for whole amount under mechanics', etc., lien law. *Isler v. Dixon*, 140—529.

Where contractor agrees with owner of lot to furnish all materials and build house, and before completion house burns, without fault of owner, contractor is liable to refund any money paid him on contract and damage for its non-performance. *Keel v. Construction Co.*, 143—429.

If contract price of building is to be paid by installments on completion of certain portions of work, each installment becomes a debt due builder as portion of work is completed; and owner would be liable for installment then due if house accidentally burned, but not for any intermediate work, labor or materials. *Ibid*, 143—429.

If contract to build house is not an entire one, if house is destroyed by fire or other inevitable accident before completion, parties are relieved from further performance and contractor may recover for what he has done, above amount paid him. *Ibid*, 143—429.

Where building contract provided for payment when "walls have been erected to second story," installment was paid and before completion, house burned without fault of either owner or contractor, owner can not recover this installment, nor can contractor recover value of walls left standing. *Ibid*, 143—429.

Where building contract provided for notes and mortgage to be given by owner, maturing after date for completion of house, which burned before completion, owner is entitled to have notes and mortgage in hands of bank, without endorsement, as collateral for money advanced contractor, canceled. *Ibid*, 143—430.

Where building is erected upon and becomes part of realty of owner, and though defective in some respects, is of real value to owner, contractor may recover value of his work, less damage to other party for failure to comply with con-

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tract. *Corinthian Lodge v. Smith*, 147—248.

When Revisal, secs. 20, 21 22, 23 have been complied with, there is a direct obligation upon part of owner to material man, and he may sue in his own name; but mere authority to contractor to collect debts due material men would not authorize him to sue in his own name on their behalf. *Perry v. Swanner*, 150—142.

Collateral agreement.—Competent to show by oral evidence collateral agreement as to how an instrument for payment of money should in fact be paid, though instrument is in writing and promise it contains is to pay in so many dollars. *Typewriter Co. v. Hardware Co.*, 143—97.

Agreement made at time of conveyance of lot to defendant that if he did not build on lot but resold it, plaintiff was to have profits, may be shown by parol and does not come within statute of frauds. *Bourne v. Sherrill*, 143—381.

Evidence of an oral stipulation made at time of execution of written contract, as part thereof, is incompetent, when in conflict or at variance with written part. *Medicine Co. v. Mizell*, 148—386.

Where contract has printed on its face that no agreement other than as stated in face of it will be recognized, if agent had authority to make the oral agreement, burden is on defendant to show it, even if such evidence were competent. *Ibid*, 148—387.

Where mortgage and notes recited an indebtedness of two hundred bales of lint cotton, evidence of mortgagor that in event of foreclosure amount to be paid was four hundred dollars in money, the original sale price of land, was properly excluded. *Walker v. Venters*, 148—383.

Parol evidence is never admitted if wording of written contract is clear, or if evidence offered is in direct contradiction of intrinsic meaning of language of contract. *Ibid* 148—390.

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Conditions precedent.—Proposal by plaintiff to buy bonds of defendant "when legally issued to the satisfaction of our attorney," the approval of such attorney, honestly and fairly expressed, was condition precedent to completion of purchase. *Webb v. Trustees*, 143—299.

If contract is to be performed to satisfaction of another, the decision of such person, if honest, is final, no matter how unreasonable. *Ibid*, 143—304.

Provision in option that grantees should make partial payment for land and secure balance by mortgage within time specified is binding only upon unconditional acceptance of and compliance with terms, and delivery of deed is not a condition precedent to tender of price, in absence of definite agreement to that effect. *Trogdon v. Williams*, 144—192.

Courts do not favor forfeitures and will, in case of doubt, so construe language that estates shall vest where there is a condition precedent, and, when vested, be protected from being divested by conditions subsequent, and where in solemn instruments under seal, language capable of but one construction is used, effect will be given to it. *McDowell v. Ry.*, 144—725.

When conditions imposed upon plaintiff in action to recover damages for non-performance of executory contract, are in nature of conditions precedent, strict compliance may be urged by defendant in bar of recovery. *Lodge v. Smith*, 147—245.

Where plaintiff leased a store-room, steam heated and ready for occupancy by certain day, and heat was not turned on for several days thereafter, defendant was not required to take store. *Ibid*, 147—245.

Where building is erected upon and becomes part of realty of owner, and though defective in some respects, is of real value to owner, contractor can recover value of his work, less damage to other party

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for failure to comply with contract. *Ibid*, 147—248.

Where it was agreed that one should apply for patent on article and another should construct a model and make certain advancements, this was not in nature of condition precedent, but obligation for breach of which, if not properly explained, plaintiff could be held responsible in taking partnership account. *Gilbert v. Machine Co.*, 147—314.

Conditions subsequent.—An agreement that in consideration of an exchange of lands, defendant was to build certain houses on the land conveyed by him to plaintiff, does not create an estate upon condition subsequent, in absence of express reservation of right of re-entry upon failure of defendant to perform his contract. *Braddy v. Elliott*, 146—580.

Whether a clause is a condition subsequent depends upon a rule of interpretation and does not obtain when meaning of contract is so plain that no construction is permissible. *Davis v. Frazier*, 150—453.

Conditions waived.—Where plaintiff and defendant contracted to buy land together, each to pay for his half, an option was taken in defendant's own name and he then informed plaintiff that he had secured loan for their joint benefit, it made no difference whether plaintiff was able to pay his part of price or not. *Russell v. Wade*, 146—119.

Consideration.—Bastardy is a civil action, and agreement not to resort to is good consideration for pecuniary promise. *Burton v. Belvin*, 142—151.

Preference within four months prior to bankruptcy diminishes common fund and is invalid, but not where there is a full and fair present consideration. *Weeks v. Spooner*, 142—479.

Law implies promise to repay money received, when there is a total failure of consideration upon

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which it was paid. *Tomlinson v. Bennett*, 145—281.

Plaintiff cannot recover upon defendant's bond for failure to complete gas plant in given time, where plaintiffs assumed authority to open streets for the purpose, was an ultra vires act. *Elizabeth City v. Banks*, 150—416.

Construed.—Clause in policy that it shall be governed by, subject to and construed only by the laws of New York, etc., void. *Blackwell v. Life Ass'n.*, 141—117.

Courts seek to sustain contracts of mutual insurance companies and look to substance and intention rather than adopting technical construction. *Perry v. Ins. Assn.*, 139—374.

Construction of written contract, when terms ambiguous, is for Court. *Banks v. Lbr. Co.*, 142—49.

Meaning of terms of contract written or verbal, when precise and explicit, is question for court; but if doubtful and uncertain, for jury. *Wilson v. Cotton Mills*, 140—53.

"All pine timber etc." of given size, in contract, means timber that size by measurement when trees are reached in process of cutting. *Lumber Co. v. Corey*, 140—462.

A proviso utterly repugnant to body of contract and irreconcilable with it, will be rejected. *Jones v. Casualty Co.*, 140—262.

All doubt or uncertainty as to meaning of insurance policies, resolved in favor of insured. *Ibid*, 140—262.

Matters bearing upon execution, interpretation and validity of contract are determined by law of place where made. *Cannady v. R. R.*, 143—439.

Exceptions to this general doctrine are (1) when contract is contrary to good morals; (2) when state of forum, or its citizens, would be injured by its enforcement; (3) when it violates positive legislation of state of forum; (4) when it violates public policy. *Ibid*, 143—439.

Where employee entered railroad

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service, joined relief department, and was injured in South Carolina, and courts of that State have interpreted the contract as an agreement to elect in event of injury, to accept benefits and release defendant, or waive benefits and sue, his election to receive benefits released his cause of action. *Ibid*, 143—440.

Where language in policy admits of two interpretations, that one is usually adopted which, without violence to words selected by parties, will sanction the claim and cover the loss, but rule will never be carried so far as to make contract for parties different from what they made themselves. *R. R. v. Casualty Co.*, 145—116.

Construction of language of contract, free from ambiguity, is for the court. *Young v. Lumber Co.*, 147—31.

Object of construction is to ascertain intent of parties and contract must be considered as an entirety, not what separate parts mean, but what it means when considered as a whole, and while in arriving at this intent words are *prima facie* to be given their ordinary meaning, this does not apply when context or admissable evidence shows that another meaning was intended. *R. R., v. R. R.*, 147—382.

When terms used in option to buy timber are doubtful, it is construed most strongly against plaintiff, who seeks to enforce option. *Hardy v. Ward*, 150—391.

A subsequent clause irreconcilable with a former clause and repugnant to the general purpose and intent of the contract will be set aside. *Davis v. Frazier*, 150—541.

Discharge.—Contract supported by valuable consideration may be discharged by express agreement. *Lipschutz v. Weatherly*, 140—365.

Release of old contract by substitution of new one, is valuable consideration. *Ibid*, 140—365.

Duration of employment.—In this country, when no time is fixed for duration of contract of employ-

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ment, and no stipulated period of payment made, contract is terminated at will of either party. *Carrier v. Lumber Co.*, 150—695.

Letters showing an offer and acceptance of employment at certain price per month, cannot be construed as a contract for a year. *Ibid*, 150—695.

Execution.—Where mental weakness is accompanied by undue influence, inadequacy of consideration and the like, equity will grant either affirmative or defensive relief, but weak understanding not of itself adequate ground to defeat enforcement of executory contract. *Sprinkle v. Wellborn*, 140—163.

Where one contracts with another, apparently sane, before insanity established, only voidable at most and not set aside where no inequitable advantage gained and parties cannot be placed in *statu quo*. *Ibid*, 140—163.

One must stand by the words of his contract, and if he will not read what he signs, he alone is responsible for his omission. *Weddington v. Ins. Co.*, 141—244.

Oral contract, complete at the time, is binding though parties subsequently agree to put it in writing. *Rankin v. Mitchem*, 141—277.

Unless fraud or deceit has been practised, or something done or said to put party off his guard at time written document is delivered and accepted, it is his duty to read it. *Floars v. Ins. Co.*, 144—241.

Forfeitures.—Forfeitures not favored by law and when incurred can only be enforced in manner pointed out in contract. *Frasier v. Gibson*, 140—272.

Contract to sell growing trees valid though signed only by vendor. *Lumber Co. v. Corey*, 140—462.

Stipulation in contract for purchase that failure to make payments forfeits what has been paid, only gives vendor right to enter and in equity cannot bar specific performance. *Hairston v. Besch-erer*, 141—205.

Courts do not favor forfeitures

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and will, in case of doubt, so construe language that estates shall vest where there is a condition precedent, and, when vested, be protected from being divested by conditions subsequent, and where in solemn instruments under seal, language capable of but one construction is used, effect will be given to it. *McDowell v. Ry.*, 144—725.

If time for performance of condition is strictly limited, forfeiture is incurred by non-performance within the time. *Ibid.*, 144—725.

While equity will relieve against a forfeiture, it will not do so when plaintiff is standing upon his legal rights under a contract fixing time limit for performance of condition, when there is nothing harsh or inequitable in its terms. *Ibid.*, 144—721.

Future.—Aldermen cannot make contract for employment of legal services binding for unlimited time and irrevocable by their successors. *Wilmington v. Bryan*, 141—667.

In action for breach of contract for future delivery of cotton, defendant may show that he did not expect to deliver cotton nor did plaintiff expect to receive actual delivery of it. *Burns v. Tomlinson*, 147—635.

Where breach of future contract occurred prior to enactment of ch. 538 Laws of 1905, only so much of Revisal 1689 applies as was embraced in ch. 221, Laws 1889. *Ibid.*, 147—636.

Promise to repay loss sustained in future contract is void. *Ibid.*, 147—647.

Action to recover loss on contract for future delivery of cotton, when plaintiff didn't expect to receive nor did defendant intend to deliver cotton, will not lie. *Ibid.*, 147—647.

Immoral.—Contract in consideration of past cohabitation, to support mother and children is in nature of reparation, and is neither void nor immoral, though illicit

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cohabitation continues. *Burton v. Belvin*, 142—151.

Bastardy is a civil action, and agreement not to resort to is good consideration for pecuniary promise. *Ibid.*, 142—151.

Defendant is under natural obligation to support illegitimate offspring and maintain mother in her sickness. *Ibid.*, 142—153.

Impairment of.—Where defendant was employed to collect back taxes under Laws 1895, ch. 182, he was merely an agent and upon repeal of statute no contract right impaired. *Wilmington v. Bryan*, 141—667.

Implied.—In action to recover for services rendered decedent, presumed in certain relations that no payment was expected and plaintiff must rebut presumption. *Dunn v. Currie*, 141—127.

Law implies promise of parent to pay for services rendered him by adult child who had married and removed from parent's home. *Winkler v. Killian*, 141—576.

When a child after arrival at full age continues to reside with and serve parent, it is presumed that service is gratuitous. *Ibid.*, 141—580.

Not necessary to allege and prove special contract for payment of services, where defendant knowingly received services. Law implies a promise to pay fair and reasonable price therefor. *Morrison v. Mining Co.*, 143—251.

A general custom in regard to terminal charges, in addition to freight charges, is a part of contract, and in absence of express stipulation to contrary wharfinger may recover of consignee reasonable and customary charges at port of delivery. *Riddick v. Dunn*, 145—31.

Action for money had and received is barred three years from breach of contract and not from receipt of money. *Tomlinson v. Bennett*, 145—281.

Law implies promise to repay money received, when there is a

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total failure of consideration upon which it was paid. *Ibid*, 145—281.

Where grandmother entered family of son-in-law after death of his wife, without contract to pay for her board, lived as a member of his family and looked after children, law raises no implied contract that she should pay board. *Henderson v. McLain*, 146—334.

Where mother after becoming member of daughter's family, became helpless, unable to render any service and altogether a charge, policy of law is that she shall be provided for and properly taken care of, and necessary cost thereof is proper charge against her estate. *Ibid*, 146—335.

Officer of corporation has no right to compensation for services except by express agreement preceding services rendered. *Caho v. Ry.*, 147—24.

When one gets into possession of farming land, without a reserved rent, he is liable to action for assumpsit, for a reasonable amount, for use and occupation. *Sessoms v. Tayloe*, 148—372.

Lex loci.—Contract for service entered into in this State, though injury occur in another State, has no bearing. *Miller v. R. R.*, 141—45.

Validity, interpretation and liability under contract is to be determined by law of place where made. *Ibid*, 141—45.

Liability of stockholders for stock in bankrupt corporation created in another State, determined by law of State of domicile. *Hobgood v. Ehleen*, 141—344.

Matters bearing upon execution, interpretation and validity of contract are determined by law of place where made. *Cannady v. R. R.*, 143—439.

Exceptions to this general doctrine are (1) when contract is contrary to good morals; (2) when State of forum, or its citizens, would be injured by its enforcement; (3) when it violates positive legislation of State of forum; (4)

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when it violates public policy. *Ibid*, 143—439.

Liability for telegraph company for mental anguish for negligent transmission of message from this State to office in another for delivery, is determined by laws of State in which message was received for transmission. *Johnson v. Tel. Co.*, 144—410.

In absence of statute fixing *lex loci* contracts, foreign insurance company and insured may fix, by agreement, place of contract as being that of residence of insurer. *Williams v. Life Ass'n.*, 145—128.

Necessity.—Conductor of freight trains has no authority to employ servants to assist in operating train, save in emergency. *Vassor v. R. R.*, 142—68.

Of non compos.—Contracts of idiots, lunatics and persons non compos generally regarded, in certain sense, invalid. *Sprinkle v. Wellborn*, 140—153.

In case of insane person law presumes fraud from condition of parties, it being stronger or weaker according to circumstances. *Ibid*, 140—163.

Non-contract law.—Facts in this case bring it within that class of cases where one has been held liable to another in absence of any contractual or other relation between them. *Kesterson v. R. R.*, 146—280.

Offer and acceptance.—An acceptance, to bind other party, must be unconditional and unqualified and must correspond exactly to terms of offer. *Tanning Co. v. Tel. Co.*, 143—373.

The offer must be one which is intended of itself to create legal relations on acceptance. It must not be an offer merely to open negotiations which will ultimately result in a contract. *Ibid*, 143—378.

Inquiry by one "if you can use 1500 creosote barrels between now and Jan. 1st," etc., is a trade letter and not an offer. *Ibid*, 143—376.

Offer withdrawn.—A lease is a sufficient consideration to support

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specific performance of option to purchase therein granted, and lessor cannot withdraw it before the time in which to accept it has expired. *Pearson v. Mallard*, 150—307.

Parol.—When parties to oral contract contemplate reducing it to writing subsequently, as a matter of prudence and not as a condition precedent, it is binding upon them, though their intent to put contract in writing was not carried out. *Gooding v. Moore*, 150—197.

Performance.—Party to contract must aver and prove performance of his own antecedent obligations, or some legal excuse for nonperformance. *Tussey v. Owen*, 139—457.

No recovery can be had for contract price unless contract has been performed. *Ibid*, 139—458.

Where answer admits breach of specific contract, plaintiff must show performance, or that other party prevented him. *Ibid*, 139—457.

Neither party to a contract can demand performance by other without alleging and proving his own readiness to perform his own part at specified time and place. *Hughes v. Knott*, 140—550.

Where contract calls for delivery of goods "immediately," one is entitled to reasonable time to deliver. *Claus v. Lee*, 140—552.

One who prevents performance of condition, or makes it impossible by his own act, cannot take advantage of nonperformance. *Harwood v. Shoe*, 141—161.

Where failure of grantee of deed to carry out contract of maintenance with grantor was due to act of heirs at law of grantor, they cannot profit by their wrongful act, though not parties to contract. *Ibid*, 141—161.

When no time specified for performance of an act or doing a thing, law implies that it may be done in reasonable time. *Winders v. Hill*, 141—694.

Contract for sale and delivery of yarns which provided that bill of

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lading be sent direct to buyer, not performed by shipping yarn with bill of lading attached, and buyer may refuse them and recover difference between contract price and what it reasonably cost him upon market to supply the goods. *Riley v. Carpenter*, 143—215.

One who invokes doctrine of substantial performance in order to show right to recover on contract, must show there has been a willful omission or departure from terms of contract. *Ibid*, 143—215.

When options are given, time is of the essence of the contract. *Trodgen v. Williams*, 144—206.

If time for performance of condition is strictly limited, forfeiture is incurred by non-performance within the time. *McDowell v. Ry.*, 144—725.

While equity will relieve against a forfeiture, it will not do so when plaintiff is standing upon his legal rights under a contract fixing time limit for performance of condition, when there is nothing harsh or inequitable in its terms. *Ibid*, 144—721.

When equitable relief against a forfeiture under a time limit in a conveyance of lands for railroad use cannot be had, defendant is confined to condemnation proceedings. *Ibid*, 144—722.

Upon failure to perform the condition that its line of road shall be completed within five years, equity will not relieve against a forfeiture because defendant, pursuant to an act affecting its construction, concentrated its force on some other part of its line. *Ibid*, 144—721.

Railroad cannot avoid a forfeiture under time limit for construction of its line of road, unless it substantially complies with provision therefor in its deed. *Thomas v. Ry.*, 144—729.

One will not be permitted to plead his own act or fault which has prevented performance of contract by other party, in order to defeat latter's recovery thereon. *Whitlock v. Lumber Co.*, 145—124.

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Allegation of contract to deliver goods by Nov. 1st is not sustained by proof of a delivery Nov. 10th, and where plaintiff purchased of defendant by correspondence a lot of salt, requesting its delivery at certain time and defendant would not promise delivery because of uncertainty of schooner shipments, action for damage will not lie. *Sumrell v. Salt Co.*, 148—555.

Power coupled with an interest.—the power to collect and receive money, agent to have half net proceeds as compensation, is not a power coupled with an interest and is revocable. *Wilmington v. Bryant*, 141—671.

Quantum meruit.—When a valid express contract is entered into, there is no place for recovery on a quantum meruit. *Reams v. Willson*, 147—305.

Ratification.—Issue of pass to plaintiff long time after injury, describing him as "injured employee," no ratification of conductors attempted employment. *Vassor v. R. R.*, 142—68.

Where town has made a contract, not within its statutory powers, but within the powers which legislature might have lawfully conferred upon it, the legislature may subsequently legalize such contract. *Wharton v. Greensboro*, 149—63.

Reading.—It is no defense that contract was not drawn according to oral agreement, where it was not read and there is no suggestion that maker was prevented from reading it or put off his guard by fraud, artifice, deception or other wrongful act of other party. *Medicine Co. v. Mizell*, 148—387.

Reformation.—Defendant bought plaintiff's land under mortgage sale, agreed to buy and sell to plaintiff with a profit, contract executed accordingly; plaintiffs have no equity to cancel or reform contract. *Yarborough v. Hughes*, 139—199.

Contract may be reformed and damages awarded in same action. *Floars v. Ins. Co.*, 144—233.

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Courts of equity will reform policy in accordance with representations made by agent, which are false and fraudulent, relied on by insured, and reasonably induced him, an illiterate man, to accept it as the one he supposed it to be. *Sykes v. Ins. Co.*, 148—20.

Contract will be reformed if there was mutual mistake of parties in drafting it, or if one was induced by fraud of other party to enter into contract to his injury. *Ibid*, 148—20.

Retaining title.—Where contract for sale of lumber provided that title should vest in plaintiff upon advancement of certain sums, contract was executory till payments were made, or, at least, performance with readiness and ability tendered and refused. *Coles v. Lumber Co.*, 150—186.

Rescission.—Generally one not allowed to rescind where he cannot put other party in statu quo. *May v. Loomis*, 140—351.

To rescind contract, injured party must act promptly after discovery of fraud; he may not rescind in part and affirm in part. *Ibid*, 140—351.

Where parties to contract come to fresh agreement of such a kind that the two cannot stand together, effect of second agreement is to rescind the first. *Redding v. Vogt*, 140—562.

Damages occurring prior to rescission of old contract and substitution of new one, waived. *Lipschutz v. Weatherly*, 140—365.

Parties to written contract may by parol rescind, or by matter in pais, abandon same. *May v. Getty*, 140—310.

Facts in the case show rescission and abandonment. *Ibid*, 140—310.

If purchaser fails to pay for goods delivered and evinces purpose not to pay for future delivery, vendor may rescind and sue for those delivered. *Grocery Co. v. Bag Co.*, 142—174.

A return, or offer to return what one has received under contract induced by fraud, is not condition

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precedent to action for deceit. *Modlin v. R. R.*, 145—223.

Time not of essence of.—Paper writing wherein one contracts to convey certain lands at a given price, provided it be paid within three years from date, and a payment of \$25, "by way of earnest is made," is a bond for title, and time is not of essence. *Davis v. Martin*, 146—281.

Varied by parol.—Where entire contract guaranteeing payment of another's debt is by letter, evidence of what was intended by letter is incompetent. *Mudge v. Varner*, 146—149.

Where mortgage for purchase money of land provided that if mortgage "was not paid before my death, afterwards it is not collectable," it is competent to show by draughtsman what mortgagee meant by this expression, and if mortgage was not paid, notes secured thereby were not collectable. *Jones v. Norris*, 147—87.

Written contract to cut and deliver 40,000 feet of lumber per week, cannot be altered by contemporaneous parol agreement "to cut what he could." *Walker v. Cooper*, 150—130.

Rule that parol evidence is inadmissible to contradict or modify a written contract does not apply where modification takes place after execution of contract. *Freeman v. Bell*, 150—148.

Where the terms of a written contract have been extended by a subsequent agreement, it may be shown by parol. *Ibid.* 150—148.

False representations sufficient to avoid a written contract may be shown by parol as a defense in action for alleged damages sustained by its breach. *Tyson v. Jones*, 150—182.

Waiver.—Where one has taken life insurance by reason of the false and fraudulent representations of agent that all premiums paid would be returned at end of five years, at which time he called for his money and was induced by similar representations to stay in an-

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other five years, he may sue for entire amount paid in. *Stroud v. Ins. Co.*, 148—55.

Where contract provided for delivery of given quantity of lumber per week, acceptance of less quantity for sometime, would not in absence of evidence, facts or circumstances, waive contract where it was intended as such. *Walker v. Cooper*, 150—132.

Contractors.

See Liens, sub-contractors; Contracts, buildings.

CONTRIBUTION.

Generally.—Right of contribution can arise only after payment by one of the debtors and mortgagee or assignee of bond cannot be required to defer enforcement of his security till debtors adjust their liabilities. *Lumber Co. v. Satchwell*, 148—317.

CONVERSION.

Generally.—When an agent has property in his hands for sale, notes and mortgages of his principal for collection, and has failed and refused to account for property or proceeds thereof, and he refuses to deliver property in his hands to plaintiff, who he admits is the true owner, it is evidence of a breach of trust and fraudulent conversion. *Organ Co. v. Snyder*, 147—272.

In a civil action for wrongful and fraudulent conversion of property by agent, the question of intent is not material. *Ibid.* 147—272.

Equitable.—Where will directs sale of land and proceeds given to legatee, and prior to the sale the legatee died, leaving a will, his interest passed as money to his executors under doctrine of equitable conversion. *Haywood v. Trust Co.*, 149—221.

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Generally.—Evidence that stock in corporation was not worth more than fifty cents on the dollar, entries in stock book as to its value,

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which witness did not make, not competent to contradict him. *Lemly v. Ellis*, 143—200.

While corporation may contract under assumed name and be bound, its managing officer, without authority, cannot bind it by endorsing in his own name, a note payable to himself for which corporation received no benefit. *Bank v. Hollingsworth*, 143—520.

Where stockholder, with knowledge of execution of lease of all of corporate property, is silent for more than a year, during which time lessee expends large sums in execution of contract, this waived any rights he originally had as to irregularities in execution of lease. *Hill v. R. R.*, 143—540.

Where resolution for lease of corporate property provided that bond be filed with State Treasurer to secure rentals, but bond placed with trust company under terms of lease, stockholders are presumed to have knowledge of lease, and any objection as to sufficiency of amount, or placing of bond, was waived. *Ibid*, 143—540.

Where alleged illegal transaction has been fully consummated and large expenditures made, benefit of which has been received by corporation and an objecting stockholder, rights of third parties have intervened so that status quo cannot be restored, court of equity will interfere only at instance of State. *Ibid*, 143—541.

Stockholder who seeks to prevent consummation of illegal corporate act, or to avoid it, should be swift to assert his rights. *Ibid*, 143—559.

Where corporation executes lease of its property for term longer than its corporate existence, lease will extend beyond that period if charter is renewed and lessor's corporate existence is thereby extended for full term. *Ibid*, 143—541.

Officer of corporation has no right to compensation for services except by express agreement preceding services rendered. *Caho v. Ry.*, 147—24.

Contract made by majority stock-

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holder without disclosing the fact that he acted as agent of corporation, may be shown by evidence aliunde to have been intended as a corporate act. *Watson v. Mfg. Co.*, 147—474.

When one has advanced money at request of corporation to enable it to perform its contract with defendant, payment to treasurer was sufficient and it was not incumbent on defendant, in order to charge corporation, to follow the fund further. *Ibid*, 147—476.

Management and entire business of corporation may be entrusted to its president either by express resolution of directors or by their acquiescence in course of dealing. *Ibid*, 147—475.

Mortgage of all its property made by corporation to its president and two directors, with authority of directors, but without any vote of stockholders to secure them in their prior endorsement of company's notes, is void; but otherwise if mortgage had been authorized at time of loan. *Edwards v. Supply Co.*, 150—172.

Alteration and repeal of charter.—All charters obtained by legislative enactment are subject to provisions of constitution Art. VIII, sec. 1, and may be "altered from time to time or repealed." *Power Co. v. Whitney*, 150—32.

Authority of officers and agents.—General manager has power to bind corporation by acts done in ordinary course of its business, but where he, without authority, attends sale of his company's property, his acts and declarations denying title of his company are not binding upon it. *Supply Co. v. Machin*, 150—746.

Conveyances to officers.—While execution of deed in manner prescribed when corporate seal is affixed, is presumed to be authorized, but this may be rebutted when executed to company's officers. *Edwards v. Supply Co.*, 150—173.

Mortgage for pre-existing debt

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given by corporation to its officers, upon stock of goods continually being depleted and renewed, possession being retained by mortgagor, is void as to other creditors. *Ibid.* 150—173.

Mortgage signed by corporation in its name, by its president, attested by secretary, corporate seal attached, and was probated upon examination of witness, valid though register omitted to record corporate seal. *Ibid.* 150—175.

Domestication.—One State may make the corporation of another State, as there organized and conducted, a corporation of its own quoad any property within its jurisdiction. *Ice Co. v. Ry.*, 144—739.

Every power which a corporation exercises in another State depends for its validity upon laws of the sovereignty in which it is exercised. *Ibid.* 144—745.

Whether Legislature has licensed a foreign corporation to exercise its powers within the State or has created a new corporation is always a question of legislative intent. *Ibid.* 144—747.

Elections.—When motion to adjourn stockholders' meeting has been carried, and a sufficient number have withdrawn to reduce number of those present below a majority of all stock issued and outstanding, election of officers cannot be lawfully held thereafter at that meeting, though adjournment was carried by illegal vote. *Bridgers v. Staton*, 150—219.

A mandamus or mandatory injunction lies to compel a corporation to transfer stock and to compel election of officers. *Sheppard v. Power Co.*, 150—781.

Foreign.—Process may not be served on travelling auditor of foreign corporation, not doing business here. *Higgs v. Sperry*, 139—299.

Right of foreign corporation to do business in the State in violation of the statute, cannot be raised collaterally by private persons, unless statute expressly or by necessary

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implication, authorizes them to do so. *Tobacco Co. v. Tobacco Co.*, 145—380.

Local agent of foreign corporation, who is. *Higgs v. Sperry*, 139—299.

Venue act of 1905 applies to all railroads, both domestic and foreign. *Propst v. R. R.*, 139—397.

Officer of foreign corporation coming here to hire hands for employment by himself, not emigrant agent. *Lane v. Commissioners*, 139—443.

Insolvency and dissolution.—Officers and members of corporation cannot evade contract rights by dissolving organization and leave creditors unprovided for. *Perry v. Ins. Ass'n.*, 139—374.

If corporation has property, it is impressed with trust for benefit of creditors. *Ibid.* 139—380.

See also *McIver v. Hdwr. Co.*, 144—484.

Purchase by one corporation of stock of another, paying for same in stock at par, which becomes worthless, and reserving stock for payment of debts of selling corporation, the sale is void as to creditors, who may follow assets into hands of others than bona fide creditors or purchasers, or value may be recovered. *McIver v. Hardware Co.*, 144—478.

Corporation buying almost entire assets of another corporation, paying members therefor, and not ascertaining or providing for its debts, is not an innocent purchaser for value and without notice. *Ibid.* 144—478.

Procedure in winding up affairs of insolvent corporation, approved. *Greenleaf v. Land Co.*, 146—508.

When one is doing a lawful thing in a lawful manner, his conduct is not actionable, though it may result in damage to another, and when directors of corporation have determined in exercise of their best judgment that corporation be dissolved, and are pursuing methods specified by statute, it is only in rare instances that their action

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should be interfered with by court. *White v. Kincaid*, 149—419.

Error to tax costs against first mortgage creditors who have established priority of their lien over rights of general creditors, in statutory proceedings to wind up affairs of insolvent corporation and to distribute its assets. *Lumber Co. v. Lumber Co.*, 150—281.

One not a creditor of a corporation cannot complain that all its debts were not paid. *Bank v. Hollingsworth*, 143—520.

Insurance upon officers.—Corporation has no right or power, if a stockholders objects, to use its funds to pay premiums on policy on life of one who is not now an officer of corporation, and where policy was taken with intent to assign it. *Victor v. Mills*, 148—118.

Cotton mill has no right to insure life of its president for its benefit and pay premiums, in absence of express authority, and validity of assignment of policy to one having no insurable interest, is denied. *Ibid*, 148—117.

Liability of members.—Members of mutual insurance companies having enjoyed protection, cannot withdraw and refuse to pay their proportion, after loss. *Perry v. Ins. Ass'n.*, 139—374.

Liability of stockholders for stock in bankrupt corporation created in another State, determined by law of State of domicile. *Hobgood v. Ehleen*, 141—344.

Stockholders, who are directors in a corporation, are liable for a joint tort or misfeasance committed by them to prejudice of others, and *Revisal 1192* does not apply. *McIver v. Hardware Co.*, 144—479.

Meetings.—Stockholders cannot discharge their duties unless organized into a deliberative meeting, though they may all severally and individually give their consent to any proposed corporate action. *Hill v. R. R.*, 143—539.

Notice to each stockholder of time and place of holding meeting is absolutely essential to its validity, unless they are present in per-

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son or proxy, or unless time and place definitely fixed by statute, charter or usage. *Ibid*, 143—539.

Where railroad resolved to lease its road at special meeting of stockholders, of which meeting one of them had no notice, and at a subsequent annual or stated meeting offered resolution directing that lease be set aside, this ratified lease so far as regularity of calling or manner of holding or conducting former meeting is concerned. *Ibid*, 143—539.

Annual or stated meeting of stockholders is presumed to be held as required by charter, in absence of proof to contrary. *Ibid*, 143—540.

Where stockholder, with knowledge of execution of lease of all of corporate property, is silent for more than a year, during which time lessee expends large sums in execution of contract, this waived any rights he originally had as to irregularities in execution of lease. *Ibid*, 143—540.

Court can only declare true result of vote by stockholders as to some measure illegally announced, because of illegal admission or rejection of certain votes; but as to adjourned meeting, stockholders not represented at first meeting and new stockholders are entitled to vote, and legal status as to adjourned meeting cannot be established till that meeting and vote taken. *Bridgers v. Staton*, 150—221.

Membership.—When there is a discrepancy between stock book and transfer book, latter controls. *Bridgers v. Staton*, 150—219.

Merger.—Where several railroads consolidated into plaintiff, merger vested in it all of their rights and powers. *R. R. v. Olive*, 142—257.

Name.—Incorporation for purpose of trade and taking corporate name, without ever engaging in business gives no perpetual monopoly in name. *Tobacco Co. v. Tobacco Co.*, 145—375.

Right to trade mark is derived from its appropriation and con-

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tinued user, and becomes the property of those who first employ it and give it a name and reputation. *Ibid*, 145—378.

Mere incorporation does not confer an exclusive right to a name. *Ibid*, 145—378.

Where corporation relies upon the right to its name, like a trade mark, it must be alleged that name has been used to such extent and in such manner as to confer a property right to it. *Ibid*, 145—378.

Organization.—Unless forfeiture has been declared, failure of corporation to organize in two years does not prevent valid organization thereafter. *R. R. v. Olive*, 142—257.

Acceptance of charter presumed from organization under its provisions. *Ibid*, 142—257.

No requirement that stock of street railway company organized under general law be issued or paid up before corporate action taken. *Ry. v. R. R.*, 142—424.

Pooling Stock.—Agreement among stockholders in private corporation to "pool their stock" and control the directors, is void. *Bridgers v. Staton*, 150—218.

See also: *Sheppard v. Power Co.*, 150—778.

Any agreement which separates the beneficial ownership of the stock from the legal title is contrary to public policy and void. *Sheppard v. Power Co.*, 150—779.

Powers of.—Any fair, reasonable doubt that corporation has power claimed, is resolved against corporation. *Elizabeth City v. Banks*, 150—412.

Power to grant franchise to business corporation over streets of city rests in Legislature and cannot be granted by city in absence of authority in its charter or general law. *Ibid*, 150—414.

Plaintiff cannot recover upon defendant's bond for failure to complete gas plant in given time, where plaintiff's assumed authority to open streets for the purpose, was an ultra vires act. *Ibid*, 105—416.

Process agent.—Caretaker of property of corporation, which was

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closing out, is not a process agent, though he sold two articles and applied proceeds to pay watchman. *Kelly v. Lefaiver*, 144—4.

Public service.—Sewerage company cannot contract away its duty to serve public. *Soloman v. Sewerage Co.*, 142—439.

Proxy.—Proxy more than three years old cannot be used in voting. *Bridgers v. Staton*, 150—218.

To same effect, see *Sheppard v. Power Co.*, 150—780.

Proxy is always revocable, though by its terms it is made irrevocable. *Ibid*, 150—780.

Public quasi.—Townships are not corporate bodies nor have they any corporate powers whatsoever, unless authorized by legislature. *Wittkowsky v. Coms.*, 150—94.

Quorum.—When motion to adjourn stockholders' meeting has been carried, and a sufficient number have withdrawn to reduce number of those present below a majority of all stock issued and outstanding, election of officers cannot be lawfully held thereafter at that meeting, though adjournment was carried by illegal vote. *Bridgers v. Staton*, 150—219.

Residence.—Residence of corporation for purpose of suing and being sued is where governing power is exercised, and is fixed by charter, without power of corporation to affect it by change of its principal place of business. *Garrett v. Bear*, 144—23.

When suit has been commenced by corporation returnable to county of its residence as fixed by charter, defendant cannot move it to county of which it is a citizen, though plaintiff may have moved its principal place of business from State. *Ibid*, 144—23.

For purpose of jurisdiction a corporation is a citizen of State creating it and cannot remove a suit to federal court for diversity of citizenship by actual authorized consolidation with foreign corporation, and a change of principal place of business, or domicile, to another

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State, prior to commencement of action, *Staton v. R. R.*, 144—136.

Legislatures of two States cannot by any joint legislation create one corporation having a domicile in each State. *Ibid*, 144—149.

Seal.—Order by corporation for machinery signed in its name by its president, is valid, without the corporate seal. *Mershon v. Morris*, 148—51.

Common seal being affixed is prima facie evidence that it was so affixed and mortgage was executed by proper authority. *Edwards v. Supply Co.*, 150—176.

Subscriptions to stock.—Tender of unpaid balance due on stock, before sale, subsequent sale void. *Wilson v. Tel. Co.*, 139—395.

Acceptance of property in payment of stock, knowingly made at grossly excessive valuation, is a fraud on creditors. *Hobgood v. Ehleen*, 141—344.

Whether one may rescind his subscription or defend his obligation therefor for fraud, after corporation has become insolvent and its affairs are in hands of receiver, is a question; but he must act with promptness and due diligence both in ascertaining fraud and taking steps to repudiate obligation. *Chamberlain v. Trogden*, 148—141.

Successors and assigns.—Use of words "their heirs and assigns," in mortgage, in referring to corporation, does not vitiate it. *Edwards v. Supply Co.*, 150—175.

Transfer Book.—When there is a discrepancy between stock book and transfer book, latter controls. *Bridgers v. Staton*, 150—219.

Voting.—It is only when several persons are voted for at same time that voter can cumulate his votes; this does not apply to voting upon adjournment. *Bridgers v. Staton*, 150—219.

Proxy more than three years old cannot be used in voting. *Ibid*, 150—218.

Ultra Vires Act.—Law does not permit persons to act as officers of corporation, make contracts, etc.,

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and avoid all responsibility by denying existence of corporation. *Perry v. Ins. Ass'n.*, 139—374.

Plaintiff cannot recover upon defendant's bond for failure to complete gas plant in given time, where plaintiff's assumed authority to open streets for the purpose was an ultra vires act. *Elizabeth City v. Banks*, 150—416.

CORPORATION COMMISSION.

Generally.—Reports of Corporation Commission are matters of public record, of which courts will take judicial notice. *Staton v. R. R.*, 144—135.

Corporation Commission is not required to institute action to recover penalty provided in Revisal 1086, simply because citizen feels himself aggrieved and makes complaint, but it should make investigation. *Hardware Co. v. R. R.*, 147—490.

Powers of.—Order of corporation commission requiring construction of sidetracks, when reasonable. *Corporation Commission v. R. R.*, 140—239.

Legislature has power, either directly or through commission to supervise and regulate conduct of common carriers. *Corporation Com. v. R. R.*, 139—126.

Corporation Commission has power to require railroad to place scale tracks. *Ibid*, 139—126.

Orders of Corporation Commission must be reasonable; subject to be reviewed by superior and supreme courts. *Ibid*, 139—126.

Reasonableness and necessity of order of Corporation Commission, question for jury. *Ibid*, 139—126.

Where court and jury failed to pass upon reasonableness of order of Corporation Commission, reversible error. *Ibid*, 139—134.

Authority to Corporation Commission to require railroads to construct and maintain union depot, is valid exercise of legislative power, *Dewey v. R. R.*, 142—392.

CORPORATION COMMISSION.

Orders of.—Unless given in express terms, appeal only lies from orders and rulings of Corporation Commission, when they affect some right or interest of parties to controversy. *Hardware Co. v. R. R.*, 147—483.

Corporation Commission has no power to enforce its orders by final process, issuing directly therefrom, and for this purpose resort must be had to ordinary courts, either by independent proceeding or appeal. *Ibid*, 147—483.

Mandamus is proper to enforce valid order of Corporation Commission, given in causes on appeal to superior court. *Ibid* 147—488.

COSTS.

Generally.—Where defendant recovers judgment of plaintiff, who appealed, new trial granted, and defendant again recovers, plaintiff is taxable with costs of first trial. *Williams v. Hughes*, 139—16.

Code, secs. 525-6 and 540, relating to taxation, refers to final recovery upon merits. *Ibid*, 139—16.

Trial court cannot ordinarily tax costs of action in favor of either party unless there is a judgment, costs being an incident of judgment. *Ibid*, 139—16.

In mis-joinder of parties plaintiff, surplus party taxed with costs incurred. *Pritchard v. Mitchell*, 139—54.

Plaintiff not chargeable with any costs when he recovers two tracts of land claimed by defendant. *Vanderbilt v. Johnson*, 141—371.

Witnesses above two to each material fact receive no pay. *State v. Wheeler*, 141—777.

Costs divided where unnecessary portions of record are sent up at request of appellee. *Wilson v. R. R.*, 142—341.

Costs of appeal discretionary with supreme court, where appellant awarded partial new trial as to one issue only. *Rayburn v. Casualty Co.*, 142—376.

When witness subpoenaed to prove negligence is not used, be-

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cause of amendment of pleadings at term eliminating the issue, and cause subsequently tried in absence of witnesses, it is exception to general rule that only witnesses for successful litigants, under subpoena, examined and sworn or tendered at trial can prove attendance. *Herring v. R. R.*, 144—208.

Rule that only witnesses subpoenaed, sworn and tendered at trial can prove, sometimes modified where it appears by motion, in apt time, that witness was unavoidably absent at time of trial, and his evidence was material. *Ibid*, 144—209.

Where new trial is granted, awarding of costs is discretionary. *Metal Co., v. R. R.*, 145—299.

Where judgment of supreme court is in favor of enterer, costs in court below should be taxed against protestant. *In re Williams*, 146—272.

When judgment is tendered before trial or verdict, costs incurred after tender cannot be recovered. *Phillips v. Little*, 147—283.

With but few exceptions, as, for instance, where continuances are granted upon agreements, or judgment, that a party pay costs, the costs of superior court follow final judgment. *Smith v. R. R.*, 148—335.

When plaintiff recovers final judgment in superior court after two successful appeals by defendant, costs of all trials in superior court should be taxed against defendant, but it is entitled to offset against final recovery all costs properly paid by it on successful appeals, including transcript and certificates. *Ibid*, 148—336.

Error to tax costs against first mortgage creditors who have established the priority of their lien over rights of general creditors, in statutory proceedings to wind up affairs of insolvent corporation and to distribute its assets. *Lumber Co. v. Lumber Co.*, 150—281.

Cotton Futures.

See Contracts, against public policy.

COUNTERCLAIM.

COUNTERCLAIM.

Generally.—Where plaintiff claims title to property and defendant denies this and claims judgment for excess over plaintiff's claim, this is a counterclaim, and the statute should be liberally construed. *Smith v. French*, 141—6.

Where plaintiff asked for an accounting and defendant submitted that plaintiff owed him a balance, a counterclaim was set up in substance. *Boyle v. Stallings*, 140—524.

Court may allow reply to counterclaim to be filed any time. *Bernhardt v. Dutton*, 146—207.

Elements of a counterclaim stated. *Slaughter v. Machine Co.*, 148—472.

Judgment upon counterclaim for failure to reply not allowed in justice's court, for pleadings are oral. *Teal v. Templeton*, 149—32.

Evidence of breach of warranty in contract for sale of goods is competent when warranty was not specially pleaded. *Woolbridge v. Brown*, 149—299.

Counterclaim for damages for defective work in repairing vessel may be set up in action to recover for work. While damages now sued for, if valid, would be a counterclaim, the foundation for them is taken away by adjudication in other action that defendant had performed its contract. *Bell v. Machine Co.*, 150—113.

Where plaintiff sold a certain machine, and defendant bought a different kind, there was no contract, but where defendant received and used the machine sent he is liable for its value and his counterclaim for difference in price of the two machines, must fail. *Machine Co. v. Chalkley*, 143—181.

Where plaintiff sued upon note given in payment for machinery, and defendant set up counterclaim for inferior materials, and recovered, he cannot set up same counterclaim in action upon other notes given in part payment. *Mfg. Co. v. Moore*, 144—528.

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Opinions as to quantity of timber covered by contract to sell, given and received as such, each party being at arm's length, cannot be set up as counterclaim in action upon notes given for purchase price. *Frey v. Lumber Co.*, 144—759.

When claim is presented to and rejected by administrator, and not referred as provided in Rev. 93, this cannot be sustained as counterclaim to action brought three years later. *Morrisey v. Hill*, 142—357.

One who has cause of action should sue, and not set up his cause as counterclaim more than three years later. *Tomlinson v. Bennett*, 145—281.

Sum paid for license to sell "tonic," guaranteed non-alcoholic, valid counterclaim in action for purchase price. *Mfg. Co. v. Davis*, 147—269.

Counterclaim for damages on account of defective work in repairing a vessel may be set up in action to recover for work. *Bell v. Machine Co.*, 150—112.

Carrier cannot recover warehouse charges on goods it wrongfully refused to deliver. *Hockfield v. R. R.*, 150—422.

Barred.—If plaintiff, in absence of agreement calculated to cause defendant to sleep on his rights, files no complaint and takes a non-suit eighteen years later, counterclaim will be barred unless claimed in independent action brought in proper time. *Tomlinson v. Bennett*, 145—282.

COUNTY COMMISSIONERS.

Generally.—County commissioners as individuals may be called on criminally to answer for a breach of duty on charge of grand jury, but not to a civil action by one or more citizens. *Ward v. Comrs.*, 146—535.

Mandamus will not lie to compel county commissioners to repair or build a court house. Duty is to be discharged subject to indictment if there is a willful failure. *Ibid*, 146—536.

COUNTY COMMISSIONERS.

Mandamus lies to require commissioners to consider bond of treasurer, but not to accept it, for they are individually liable if they take a bond known, or which should be known to be insufficient. *Burke v. Comrs.*, 148—47.

Appeals from county commissioners are governed by rules applying to appeals from justices of the peace, and must be docketed at first ensuing term of superior court. *Sutphin v. Sparger*, 150—518.

Contracts of.—What contracts Board of County Commissioners may make. *Glenn v. Comrs.*, 139—412.

Statement of.—Revisal 1388, requiring county commissioners to publish statement of county affairs, only applies to members of incoming board who hold office. *Shelton v. Moody*, 146—426.

COUNTY TREASURER.

Warrants upon.—County Treasurer may not refuse to pay county order issued by commissioners because he does not think it a just or lawful claim or for any other reason, when it has been passed upon by board and within its power to act. *Audit Co. v. McKensie*, 147—467.

County Treasurer cannot attack the order given by board of audit and finance collaterally by merely denying any knowledge of transactions upon which it was based, no fraud or other illegality being alleged. *Ibid*, 147—468.

Course and Distance.

See Deeds, description.

COURTS.

Generally.—Legal existence of a court cannot be drawn in question by plea to jurisdiction. *State v. Hall*, 142—710.

Special Term.—Order of Governor for term of court, made in another State, valid. *State v. Hall*, 142—710.

Judge holding special term may

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issue restraining order, and hear case when within his jurisdiction, but where no pleadings have been filed, and summons not yet returnable, resident judge should hear and determine the case. *Royall v. Thornton*, 150—294.

Orders of.—Upon order to produce papers before clerk, respondent not required to deposit papers in clerk's office. *Mills v. Lumber Co.*, 139—524.

Administrative order of court not res judicata. *Ibid*, 139—524.

One may make motion in case in which he has judgment, for order directed to defendant to make assessment under charter and by-laws, and court may enforce performance by order. *Perry v. Ins. Assn.*, 139—375.

In mutual insurance companies, amounts due upon assessments already made, or to be made to pay losses accrued, court may enforce collection. *Ibid*, 139—380.

Question for.—Whether by-law is reasonable, question of law for court. *Duffy v. Ins. Co.*, 142—103.

Construction of language of contract, free from ambiguity, is for the court. *Young v. Lumber Co.*, 147—31.

Supreme, Discretion of.—Where two issues are independent and clearly severable, discretionary with supreme court to restrict new trial to said issues. *Yarborough v. Hughes*, 139—200.

Supreme, Power of.—Supreme court has unquestioned power to set aside a verdict not supported by evidence. *Brown v. Power Co.*, 140—334.

Supreme court has no power to interfere with verdict when there is proper evidence for jury. *Ibid*, 140—334.

After judge has settled case on appeal, supreme court has no power to order judge to make sundry changes in "case." *Slocumb v. Const. Co.*, 142—349.

Supreme court is not concluded by reason given in court below for its decision. If valid and sufficient

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ground supporting judgment appears in record it will be affirmed. *Burns v. McFarland*, 146—384.

Supreme court will grant new trial of its own motion when facts may be more developed and questions intended to be presented, more clearly presented, when to do otherwise injustice might be done to one or both parties. *Hawk v. Lumber Co.*, 149—16.

COURTESY.

How defeated.—Where first child was born after adoption of constitution of 1868, and marriage of parents took place before then, and wife died owning title in fee, she might convey her interest in land and rents accruing and defeat husband of his right of courtesy. *Richardson v. Richardson*, 150—553.

Covenant.

See Deeds, breach of covenant; Warranty, generally.

Coverture.

See Husband and Wife, conveyances; Married Women.

CREDITORS.

Rights of.—Officers and members of corporation cannot evade contract rights by dissolving organization and leave creditors unprovided for. *Perry v. Ins. Ass'n.*, 139—374.

If corporation has property, it is impressed with trust for benefit of creditors. *Ibid*, 139—380.

CROP.

See Liens, crop.

Cumulative Evidence.

See New Trial, newly discovered evidence.

CUSTOM.

Generally.—Neither usage nor custom, as general rule, will sanction or excuse an act which law condemns as negligent. *Stone v. Steamship Co.*, 139—195.

See also Evidence, custom.

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Generally.—Mental anguish cannot be recovered by father, as administrator, as element of damage, for negligent killing of son, but only in action in his own name. *Byrd v. Express Co.*, 139—277.

There is no law or practice which will permit a tender of judgment of one dollar as nominal damages as aid to defective demurrer. *Hall v. Tel. Co.*, 139—369.

Assessment of damages in condemnation proceedings need not be by twelve freeholders. *State v. Jones*, 139—613.

Under sections 1498-9 of Code, question is, did relatives suffer any pecuniary loss because deceased failed to live out his expectancy, and jury may consider entire life, character, habits, health, capacity etc., of deceased. *Carter v. R. R.*, 139—499.

In awarding damages for mental anguish, law governing cases for breach of contract, applies. *Dayvis v. Tel. Co.*, 139—79.

Where plaintiff voluntarily ceased payment and abandoned his policy no action lies for its cancellation. *Green v. Ins. Co.*, 139—312.

Where wrongful act of servant was a wanton tort, but as to master it was a mere breach of duty, only compensatory damages allowed. *Stewart v. Lumber Co.*, 146—51.

Action for damages for wrongful death is given to administrator appointed as such in this State. *Hall v. R. R.*, 146—345.

In a pure tort, wrong-doer is responsible for all damages directly caused by his misconduct, and consequential damages caused by the wrong, under facts as they then existed. *Bowen v. King*, 146—390.

Master is liable for actionable wrong committed upon fellow-servant by one under whose direction he was working. *Avery v. Lumber Co.*, 146—593.

Method of taking land for public use is within exclusive control of Legislature, limited by organic law, and courts cannot help injured land-owner, where statute has been

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strictly followed, until question of compensation is reached. *Durham v. Rigsbee*, 141—128.

When a passenger is carried by his station, he may recover though there be no bodily harm or actual damage, and where train did not stop at passenger's destination, and ticket had nothing upon its face to contrary, she should have been given this information before allowing her to board train. *Hutchinson v. R. R.*, 140—123.

All damage resulting in single wrong must be recovered in one suit. *Eller v. R. R.*, 140—140.

One is entitled to actual market value of his property taken for public use. *Brown v. Power Co.*, 140—333.

Jury not wholly guided by mortality table in fixing expectancy. *Sledge v. Lumber Co.*, 140—459.

When a right is once violated in a small degree, the injury at once arises and cause of action is complete. *Mast v. Sapp*, 140—533.

In action for negligent burning of factory, plaintiff may show that he had a contract to deliver crates at a fixed profit; that material was on hand at time of fire with which to complete this contract and it was then impossible to replace it. *Johnson v. R. R.*, 140—574.

When cause of action is based upon wrongful invasion of plaintiff's rights of person or property, he may recover all such damages, either direct or consequential, as flow naturally and proximately from the trespass, whether they could have been anticipated or not. *Ibid*, 140—574.

Where profits lost by defendant's tortious conduct, naturally flow from his act and are reasonably definite and certain, they are recoverable; those which are contingent and speculative are not. *Ibid*, 140—574.

From every action of trespass some damage is inferred, and allegation of trespass here is sufficient. *Davenport v. R. R.*, 148—287.

When allegation and proof at least entitle plaintiff to nominal

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damages for breach of contract, motion for non-suit because no substantial damage is shown, will be denied. *Edwards v. Erwin*, 148—429.

In action by next friend for injuries to boy, his father is entitled to his wages during minority. *Hayes v. R. R.*, 141—199.

When one violates his contract he is liable for such damages, including gains prevented and losses sustained, which may fairly be supposed to have entered into making of contract, that is, such as might naturally be expected to follow its violation, and they must be certain, both in their nature and in respect to cause from which they proceed. *Machine Co. v. Tob. Co.*, 141—284.

In action for breach of contract, in absence of some standard fixed by parties when making contract, law will not permit mere profits, depending upon chances of business and merely fanciful, as part of compensation. *Ibid*, 141—284.

Evidence in action for trespass on lands, north of certain line, which failed to show cutting was north or south of said line, too conjectural to form basis of verdict. *Berry v. Lumber Co.*, 141—386.

Recovery on accident policy providing for weekly indemnity, cannot be had for any time subsequent to date of summons. *Rayburn v. Casualty Co.*, 141—425.

The annuity act, ch. 347, L. 1905, is incompetent to show present value of intestate's life. *Poe v. R. R.*, 141—525.

All damages, both present and prospective, for breach of contract, single and entire, may and usually must be recovered in one and the same action. *Wilkinson v. Dunbar*, 149—22.

No error for judge to add the word "dollars," where jury had answered the issue as to damages "five thousand" and the pleadings and evidence warranted it. *Cox v. R. R.*, 149—86.

When one is doing a lawful thing in a lawful way, his conduct is not actionable, though it result in in-

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jury to another. *White v. Kincaid*, 149—415.

Defendant is only responsible for such damages as were reasonably in contemplation of parties as natural result of failure of duty on part of company. *Hancock v. Tel. Co.*, 142—163.

To make one liable for negligence, it is sufficient if by exercise of reasonable care defendant might have foreseen that some injury would result from his act or omission, or that consequences of injurious nature might have been expected. *Hudson v. R. R.*, 142—198.

Where act causing injury is in itself lawful, liability depends not upon results that may flow from it, but upon ability of prudent man, in exercise of ordinary care, to foresee that injury or damage will naturally or probably result. *Jones v. R. R.*, 142—207.

No action lies for smoke and cinders emitted by engines ordinarily, yet where engines were used upon structures and under conditions which jury find are negligent, damage inflicted is for jury. *Thomason v. R. R.*, 142—300.

Doing a thing in authorized way and without negligence, when directed by Legislature, acting within constitutional limitations, is not wrongful. *Dewey v. R. R.*, 142—392.

Where plaintiff complains of trespass in cutting timber "to his great damage," he may recover value of timber removed "together with adequate damages for any injury to land in removing it." *Davis v. Wall*, 142—450.

Relief should be given according to facts alleged and proved, without regard to whether suit is upon contract or in tort. *Williams v. R. R.*, 144—498.

Where highway has been unlawfully obstructed and abutting owner suffers special damage, he may sue in his own name and obtain injunction. *Tise v. Whitaker-Harvey Co.*, 144—507.

At least nominal damages are recoverable for breach of contract of

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sale. *Mfg. Co. v. Machine Works*, 144—689.

Where plaintiff was injured by falling from his mule, which fell in crossing defendant's tracks because planks had been removed, question of negligence is for jury. *Goforth v. Ry.*, 144—571.

Owner holds his land subject to natural disadvantages as to surface waters, and is liable to adjoining owner for such damages as may result proximately from his erection of dam across natural flood-channel of river on his own lands, thus ponding water on adjoining lands. *Clark v. Guano Co.*, 144—64.

Tort-feasors contributing to same injury are jointly and severally liable, and he who puts in motion one cause of injury is liable to same extent as if it were the sole cause. *Ibid.*, 144—64.

One negligently injured may recover for amount paid osteopath for services and nursing, though osteopath could not recover for such services under Rev. 4502, or if his rights were barred by statute of limitations. *Allen v. Traction Co.*, 144—446.

In action for water falling from defendant's roof upon plaintiff's wall, immaterial that damages would have been lessened had plaintiff's building been constructed better. *Davis v. Smith*, 144—297.

Mental anguish may be considered in action for willful failure to deliver whiskey, purchased by plaintiff for his dying mother, and he is not restricted to action for breach of contract. *Thompson v. Express Co.*, 144—392.

While costs and expenses upon breach by defendant of its contract to exhibit plaintiff's machine for advertisement and sale, they are such only as plaintiff may have actually incurred in making exhibit, and when no expense was incurred, none can be recovered. *Machine Co. v. Tob. Co.*, 144—421.

Additional damages, in action between same parties, for same injury, cannot be recovered after

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judgment in former action. *Painter v. R. R.*, 144—436.

Lower proprietor must receive surface water which falls on adjoining higher lands, and it is error to charge that defendant owed duty to provide side ditches sufficient to collect and carry off surface water coming down from land above in its natural flow. *Greenwood v. R. R.*, 144—446.

A corporation purchasing from officers and stockholders of another corporation its entire assets, without provision for creditors, is, with officers and directors, jointly and severally liable to receiver for amounts necessary to pay claims, interest and cost against it. *McIver v. Hardware Co.*, 144—478.

In wrongs of the kind presented here, not involving any physical interference with personal or proprietary rights of another, recovery cannot be had, even for nominal damages, by simply showing the creation of a nuisance; but plaintiff must go further and show that it has injuriously affected him in some substantial right, or there is imminent danger that it will do so. *Ibid*, 150—661.

Where offer and acceptance did not result in contract, only nominal damages recoverable for delayed message of acceptance. *Tanning Co. v. Tel. Co.*, 143—376.

Mere fright, without physical injury, is no element of damage; but where fright occasions physical injury directly traceable to it, action for such negligent injury lies. *Kimberly v. Howland*, 143—398.

Reasonable attorneys' fees paid by present plaintiff in defense of a malicious prosecution, may be recovered. *Stanford v. Grocery Co.*, 143—427.

If contract price of building is to be paid in installments on completion of certain portions of work, each installment becomes a debt due to builder as work is completed, and if house burns, owner would be liable for installments then due, but not any intermediate

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work and materials. *Keel v. Const. Co.*, 143—429.

When one contracts with owner of lot to furnish materials and build house, contract being an entire one, if house, before completion, is burned without fault of owner, and contractor refuses to proceed further, he is liable for money paid him on contract, and damages for its non-performance. *Ibid*, 143—429.

Private citizen may not sue for public nuisance, unless he suffers some damage not common to public. *Pedrick v. R. R.*, 143—485.

City is liable to owner for taking his land in widening its streets in full amount of damages, reduced by value of benefits conferred by improvements, and he may sue and recover therefor as distinguished from those in tort, where recovery may not be had unless work was done in an unskillful manner. *Quantz v. Concord*, 150—539.

For private citizen to sustain action for public nuisance, he must show some damage or injury special and peculiar to himself and differing in kind and degree from that suffered by general public. This does not apply when a public nuisance involves also the invasion of a private right. *McManus v. R. R.*, 150—658.

When an injustice has been done, judge may set aside verdict, where damages are either excessive or inadequate. *Isley v. Bridge Co.*, 143—51.

Levy upon excessive quantity of property does not make plaintiff in attachment liable for abuse, in absence of his advice or encouragement. *R. R. Co. v. Hardware Co.*, 143—54.

Evidence as to character of land and value of crops raised prior to appropriation, competent in action by landowner for damages to land condemned. *Creighton v. Water Comrs.*, 143—171.

Matters in mitigation may be shown under answer containing general denial only, and need not be specially pleaded. *Ibid*, 143—171.

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In exercising right of condemnation, care must be taken to avoid, by use of all reasonable means, all unnecessary damage to lands. *Parks v. R. R.*, 143—289.

In proceeding by owner to assess damages for land taken for highway, notice must be given township trustees and county commissioners. In re *Wittkowsky's Land*, 143—247.

In action for negligent construction of drain by railroad, issues should be so framed that plaintiff recovers damages up to the trial, not exceeding five years, and for permanent easement, which is acquired by payment of judgment. *Parks v. R. R.*, 143—289.

Action for assault must be brought in one year, and to rebut plea of statute, plaintiff must show an agreement by defendant not to plead it, and mere promise to investigate charges and his unaccepted request not to sue, are insufficient. *Brown v. R. R.*, 147—217.

Whether promise not to plead statute, in action for damages for assault, should be in writing, *quaere*. *Ibid*, 147—217.

Partnership formed for purpose of patenting a device, cannot be dissolved by one partner profitably disposing of patent and refusing to account. *Gilbert v. Machine Co.*, 147—308.

Where train upon which plaintiff was a passenger did not stop at his station, and plaintiff went upon steps, in view of conductor, as train approached station, and jumped as it was increasing its speed, he cannot recover, although a cause of actions was stated for running by station and would entitle him to nominal damages. *Owens v. R. R.*, 147—359.

Where railroad company is acting within its lawful rights in operating road, but unlawfully invades right of land owner, wrong must be redressed by award of permanent damages. *Beasley v. R. R.*, 147—362.

Widow may recover punitive damages for defendant's knowingly

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permitting the mutilated body of her husband to remain upon and along its track in unprotected condition and to be repeatedly run over by its trains, from wanton or willful motive. *Kyles v. R. R.*, 147—394.

Abutting owner may sue for damages peculiar to him, caused by laying track, his action must be brought within five years and his action may be barred, though town is not barred for obstruction of street. *Staton v. R. R.*, 147—428.

Upper owner is liable to lower owner for damages caused by diversion of water by his ditches and not carried to a natural waterway. *Briscoe v. Parker*, 145—14.

In action for injuries sustained in jumping from moving train, in view of collision, evidence of speed of engine and conditions of wrecked engine and cars, competent upon question of necessity for jumping. *Davis v. R. R.*, 145—95.

Use by defendant of its tracks and terminals within its chartered powers, and with reasonable care, gives no cause of action, though smoke and noise become objectionable. *Taylor v. Ry.*, 145—403.

No action lies for flooding defendant's land caused by closing the cross canal, which served to protect the lands from overflow water coming from their natural direction into main canal. *Canal Co. v. Burnham*, 147—47.

Evidence of suffering since injury of nervousness and excessive "nightmares," corroborating expert evidence of physician as to effect of bodily injury, competent. *Brown v. R. R.*, 147—136.

In action for special damage caused by public nuisance, plaintiff must show that such nuisance was proximate cause of injury. *McGhee v. R. R.*, 147—142.

Action for damages caused by construction of railroad must be brought within five years, but where damages are not of a permanent nature, action should be brought within three years. *Staton v. R. R.*, 147—447.

Damages for loss of rents cannot

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be recovered in action for delayed delivery of brick for building store, when carrier was not informed of purpose of shipment. *Development Co. v. R. R.*, 147—503.

Subsequent promise to repay another for loss arising from contract for futures, is void. *Burns v. Tomlinson*, 147—645.

Where under a certain issue permanent damages were awarded plaintiff, when from character of injury or otherwise, he was entitled to recover damages, use of the term "permanent" would not be to defendant's prejudice. *Spence v. Canal Co.*, 150—160.

Permanent damages to land cannot be recovered of independent contractor who has constructed roadbed for railroad company over lands of another according to plans of company's engineer, for his authority ceased when work is turned over to and accepted by company. *Willis v. White*, 150—199.

When one has contracted to construct a roadbed upon track for railroad company according to its plans, and he enters upon lands for that purpose, both he and company are liable for his negligent failure to protect land and growing crops from injury caused by construction. *Ibid*, 150—199.

Married woman may sue in her own name for damages to her land caused by improper construction of roadbed. *Ibid*, 150—199.

Lessee need not sue tenant in possession holding over, but may recover damages of lessor. *Sloan v. Hart*, 150—270.

Remedy of owner of land on a street which has been used for railroad purposes, against defendant for using additional tracks necessary for maintenance of union depot, is action for damages for additional burden, and not injunction. *Griffin v. R. R.*, 150—312.

Damages for breach of executory contract, in which there is no equitable element, can only be recovered by plaintiff's proving compliance with his obligation thereunder. *Hardy v. Ward*, 150—386.

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Where plaintiff was injured by rail rebounding while unloading, which was being done in safest way, car was properly loaded and sufficient help furnished to unload rails, the injury was an accident. *Lassiter v. R. R.*, 150—483.

In action for wrongful cutting of timber by defendant under its contract, evidence in diminution of damages, that it has acquired a superior outstanding title, is competent. *Sample v. Lbr. Co.*, 150—165.

Compensatory.—If railroad knowingly permits passenger to take articles as baggage, not properly such, with or without extra charge, liable for loss though without any fault. *Trouser Co. v. R. R.*, 139—382.

Railroad has no right to leave baggage on depot platform exposed to weather for three days. *Ibid*, 139—382.

Railroad liable for loss or damage to property, other than personal baggage of passenger, if it has knowledge. *Ibid*, 139—382.

Damages for loss of rents caused by contractor's fault, recoverable. *Donlan v. Surety Co.*, 139—212.

Where engineer blew whistle for sole purpose of scaring plaintiff's mule, but not at a crossing or in furtherance of master's business, only compensatory damages allowed. *Stewart v. Lbr. Co.*, 146—49.

Compensatory damages allowed addressee for wrongful failure to deliver telegram. *Dayvis v. Tel. Co.*, 139—78.

Husband entitled to damages for mental anguish, when. *Ibid*, 139—80.

Where owner of land employed one to cut standing timber and before contract was completed land was sold to another, original owner is liable for compensatory damages and purchaser takes land free from any right or claim on account of cutting of timber. *Biggers v. Matthews*, 147—301.

For the flooding of plaintiff's land, permanent damages against railroad may be recovered in one

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action, but independent contractor if liable at all for constructing roadbed according to plans furnished by railroad company's engineers, cannot be for any other damage than accrued prior to completion of work and delivery to owner. *Willis v. White*, 150—203.

Damages against independent contractor for flooding lands caused by construction of road by improper plans furnished by railroad company's engineers if allowed at all, can only be assessed up to time of trial, as contractor has no right to go upon roadbed after turning it over to master. *Ibid*, 150—205.

Duty to Diminish.—Where tort has been committed, and as to element of damages, injured party must do what he reasonably can in exercise of reasonable care and diligence to avoid or lessen the consequences of the wrong, and for any part of the loss incident to such failure, no recovery can be had. *Bowen v. King*, 146—391.

Duty of one injured by another's breach of contract or tort to use all ordinary care and all reasonable exertions to render injury as light as possible. *Hocutt v. Tel. Co.*, 147—193.

Where one has a contract of employment for a year and is wrongfully discharged before then, he would be entitled to such damages less what he might have earned upon reasonable effort. *Currier v. Lbr. Co.*, 150—694.

Excessive.—Discretionary with judge to set aside verdict for excessive damages, and this is not reviewable. *Boney v. R. R.*, 145—250.

Future.—Additional damages are not recoverable in a subsequent action after judgment has been entered, on account of same injury, between same parties. *Painter v. R. R.*, 144—437.

Measure of.—Measure of damages for breach of contract in failing to deliver goods having market value. *Hosiery Co. v. Cotton Mills*, 140—452.

In action for wrongful death, what
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is proper measure of damages. *Carter v. R. R.*, 139—499.

In action for negligent burning, evidence that plaintiff had a contract to deliver certain crates at fixed profit, that he had on hand material to complete contract, and since fire impossible to replace it, competent upon issue of damages. *Johnson v. Ry.*, 140—574.

Upon breach of contract, one is liable for gains prevented and such losses sustained that fairly entered into contemplation when contract made. *Machine Co. v. Tobacco Co.*, 141—284.

In action for negligently causing death, court should not permit jury to consider "annuity act," for purpose of ascertaining present value of intestate's life. *Poe v. R. R.*, 141—525.

"Income" embraces only net profits arising from a fund after deducting all necessary expenses and charges. "Annuity" is fixed amount directed to be paid absolutely and without contingency. *Ibid*, 141—526.

Resolution giving certain per cent of back taxes collected, confers no interest in taxes collected, but measures compensation. *Wilmington v. Bryan*, 141—666.

Failure of employee to seek other employment after wrongful discharge, competent only in diminution of damages. *Smith v. Lbr. Co.*, 142—27.

Where one is employed for a certain time and is wrongfully discharged before then, he is generally entitled to full wages for whole time. *Ibid*, 142—34.

Measure of damages for passenger negligently injured, approved. *Ruffin v. R. R.*, 142—121.

Measure of damages in action for nuisance, is depreciation in value of home as dwelling three years before bringing action, inconvenience and unpleasantness. *Thomasson v. R. R.*, 142—300.

Measure of damages for breach of covenant of seisin is purchase money and interest. *Eames v. Armstrong*, 142—507.

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In action for malicious abuse of process by attachment of plaintiff's cars, measure of damage is interest upon value of cars increased or diminished by deterioration of cars in daily use. *R. R. v. Hardware Co.*, 143—51.

Contract for sale and delivery of yarns which provided that bill of lading be sent direct to buyer, not performed by shipping yarn with bill of lading attached, and buyer may refuse them and recover difference between contract price and what it reasonably cost him upon market to supply the goods. *Riley v. Carpenter*, 143—215.

In action for breach of contract for sale of yarn, measure of damages is difference between contract price and market value at time when and place where goods should have been delivered under terms of contract. *Tillinghast v. Cotton Mills*, 143—268.

Where one seeks to recover additional damages for breach of contract, arising by reason of special circumstances, he must show that defendant, at time contract was entered into, had knowledge of them and it could be inferred they were contemplated as affecting question of damages. *Ibid*, 143—269.

Where there has been breach of contract definite and entire, injured party must do what fair and reasonable prudence requires to save himself and reduce damage; or damage arising from his own neglect is too remote. *Ibid*, 143—268.

Measure of damages to shipment of car-load of perishable goods, caused by defendant's negligence, is net value at destination, after deducting commissions and cost of sale, and stipulation in bill of lading that such should be the value of goods at place of shipment is void. *McConnell v. R. R.*, 144—88.

When property is lost or destroyed by negligence of another, usual rule as to measure of damage is reasonable worth of property at time and place of its destruction. *Hart v. R. R.*, 144—92.

In action for damages for injuries, amount plaintiff paid to osteo-

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path for services is competent though recovery by osteopath for services was barred. *Allen v. Traction Co.*, 144—288.

In action upon breach of contract for exhibition of machine by defendant, only costs and expenses that plaintiff may have actually incurred in making exhibit are recoverable. *Machine Co. v. Tob. Co.*, 141—421.

Measure of damages stated in action for negligent failure to carry on train. *Williams v. R. R.*, 144—499.

In action for breach of contract for sale of perfect machine, where defendant declined to receive machine and promised to repair it, which was done, measure of damage is extra expense incurred while trying imperfect machine and such damages as were reasonably contemplated when contract was made. *Mfg. Co. v. Machine Works*, 144—689.

Remedy for improper drainage by upper proprietor is action for damage, or he may proceed under Revisal, 3983. *Briscoe v. Parker*, 145—14.

Competent for plaintiff to testify, upon measure of damages, that defendant had promised him promotion. *Daniel v. R. R.*, 145—51.

Measure of damage for breach of several covenants, discussed. *Fishel v. Browning*, 145—72.

Measure of damages for injury done one's land by constructing railroad upon it, is a fair compensation. *Beasley v. R. R.*, 145—278.

Purchase price is usually the measure of damages for breach of covenant of seisin, but if covenantee perfects his title for less amount, he will only recover what he paid. *Eames v. Armstrong*, 146—9.

Proof of good faith and lack of actual malice, and general bad character of plaintiff, competent in mitigation of damages for libel. *Logan v. Hodges*, 146—43.

When contract to sell land was entire, and title to one of several tracts defective, measure of damages is the proportion the value of land covered by paramount title

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bears to the whole, estimated on consideration paid. *Lemly v. Ellis*, 146—222.

Where warranty of title was defective, but vendee has procured a good title, basis of recovery would be amount reasonably paid to buy in outstanding title; if it did not exceed purchase money. *Ibid*, 146—222.

In action for ponding water caused by improper construction of culvert, measure of damages is market value of land taken and deterioration of other by flooding. *Myers v. Charlotte*, 146—246.

Express company is liable for value of goods at date of shipment, though it did not know of contents of package, where goods have suffered no physical injury, but have lost their value because of delayed shipment. *Lambert v. Express Co.*, 146—322.

Measure of damages for a pure tort, stated. *Bowen v. King*, 146—390.

Measure of damages for trespass upon land, cutting timber and building bogy road, is difference in value of land before and after injury complained of. *Brickell v. Mfg. Co.*, 147 119.

In action for damages for placing poles and wires on plaintiff's land, measure of damage is diminution in value of the land by occupation and appropriation of it to the extent of easement acquired by defendant under its charter in placing and keeping poles and wires thereon. *Wade v. Tel. Co.*, 147—221.

Where a contract was assigned to one's lessee, who broke the terms of it so that action was brought and recovery had against the original party or lessor, he having been forced to pay, can recover of lessee the amount of this enforced recovery. *R. R. v. R. R.*, 147—386.

Damages for wrongful delay in shipment of goods having market value and usually supposed to be in contemplation is difference in value of goods at time when they should have been and were delivered. *Development Co. v. R. R.*, 147—508.

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In some cases value of user of goods may be recovered if they are in condition to use, and in absence of appreciable loss, from either source, interest on money invested in goods for time wrongful delay would be correct measure of compensation. *Ibid*, 147—508.

Where ignorant man was induced by fraudulent representations of agent to take life policy, which was not the contract he thought he was buying, measure of damages is amount paid in, with 4 per cent it being rate provided in policy, and defendant is not entitled to deduct actual cost of insurance for the 10 years it was to run. *Sykes v. Ins. Co.*, 148—22.

Current profits of going manufacturing enterprise, dependent on varying cost of labor and materials and fluctuations of market values of material, generally too uncertain to form basis of award of damages for breach of contract affecting operation of plant, and where substantial damages are recoverable they are ascertained on basis of interest on capital invested which is unproductive for time, pay of hands idle and necessarily unemployed, and incidentals reasonably referable to defendant's wrong. *Furn. Co. v. Express Co.*, 148—89.

When mortgage and notes provide for payment of 200 bales of cotton, upon foreclosure the amount due on mortgage is value of cotton at market price when each installment fell due, with interest, subject to payments and set-offs, if any. *Walker v. Venters*, 148—390.

For purpose of showing decreased earning capacity, plaintiff may testify what wages he received before the injury, and what he was receiving in his condition at the trial, and whether or not he caused the injury to himself. *Rushing v. R. R.*, 149—160.

Testimony of doctor that injuries are not permanent, will not prevent verdict allowing for future suffering. *Ibid*. 149—163.

In action for breach of contract for goods ordered, measure of damage is difference between what it

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would cost plaintiff to carry out its part of contract and the contract price, and if defendant intended to rely upon fact that plaintiff could not have complied with its contract, or that it was otherwise profitably employed during time it was engaged in filling this order, this defense should have been alleged and proved. *Springs Co. v. Buggy Co.*, 143—534.

Present and prospective damages should be assessed for breach of contract, the measure of damage being the value of the contract at the time of the breach. *Hawk v. Lbr. Co.*, 149—13.

In action for breach of contract, evidence of the subsequent increased cost of labor, to diminish profits during period of time required to fulfill contract, is incompetent. *Ibid*, 149—13.

In action for failure to promptly ship iron, causing factory to stop, in absence of evidence as to use of iron, measure of damages stated, improper. *Mfg. Co. v. R. R.*, 149—261.

Measure of damages for defective work done on a vessel in repairing it, is necessary cost of having defects repaired and interest on value of vessel, hire of employees, and the like, during the additional delay. *Bell v. Machine Co.*, 150—112.

In action for breach of warranty in contract for sale of engine, measure of damages is difference between value of engine received and what it would have cost to purchase such an engine as that described in contract and warranty. *Mfg. Co. v. Oil Co.*, 150—151.

Measure of damages for failure to receive lumber under contract, is difference between contract price and what it cost to cut and place lumber on yard, that is, the profit on lumber, subject to a reduction of such profit, if any, as defendant made by selling to some other person. *Coles v. Lbr. Co.*, 150—191.

For breach of ordinary business contract, jury should be given some

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measure of damages for their guidance, and not to give "whatever they found to be a reasonable allowance." *Ibid*, 150—190.

If one is under contract obligation to remove lumber from yard at given time, and fails to do so, in absence of any special circumstances entering into contract, he is liable for fair rental value of use of yard. *Ibid*, 150—188.

Measure of damages for breach of implied covenant in lease, that lessee should be put in possession at future specified time, is difference between rent agreed upon and market value of the term, plus any special damages alleged and proved. *Sloan v. Bart*, 150—275.

Not necessary that net earnings of decedent exceeded expenditures for administrator to recover. *Carter v. R. R.*, 139—490.

City is liable to owner for his land taken in widening its streets, in full of amount of damages, reduced by value of benefits conferred by improvements; and owner is entitled to recover therefor as distinguished from doing work in unskillful manner. *Quantz v. Concord*, 150—540.

Mitigation.—When there has been a negligent delay in the delivery of a death message, it was not incumbent upon plaintiff, as a matter of law, to drive several miles across the country so as to reach funeral in time and cure defendant's neglect. At most, failure to do so, if practicable, would be in mitigation of damages. *Bailey v. Tel. Co.*, 150—317.

Nominal.—Where operator received a message, with money to pay charges of transmission, and fails to send it, a wrong is committed to plaintiff which gave her a cause of action and entitled her to at least nominal damages, whether there was a breach of contract or tort. *Hocutt v. Tel. Co.*, 147—189.

Every unauthorized and unlawful entry into the close of another is a trespass, from which the law infers some damage. *Brame v. Clark*, 148—365.

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When plaintiff has alleged and proved facts which, at least, entitle him to recover nominal damages arising from breach of contract, nonsuit will not lie upon theory that no substantial damages have been shown. Quantum of damages beyond those which are nominal, must be determined by the jury, under proper instructions, and is not involved in motion to nonsuit. *Edwards v. Erwin*, 148—433.

Punitive.—Circumstances tending to show rudeness, insult, etc., punitive damages proper. *Ammons v. R. R.*, 140—196.

If conductor maliciously or wantonly carried plaintiff by her station, punitive damages proper. *Hutchinson v. R. R.*, 140—123.

Vindictive damages allowed, when. *Jackson v. Telephone Co.*, 139—347.

Jury may award punitive, in addition to compensatory damages, if defendant acted wantonly with criminal indifference to civil obligations. *Ibid*, 139—347.

Punitive damages proper where passenger wrongfully ejected from train at night by conductor and brakeman in rude, stern, harsh, humiliating manner. *Parrott v. R. R.*, 140—546.

Punitive damages lie when jury draw from evidence fraud, malice, recklessness or wanton aggravation on defendant's part. *Hayes v. R. R.*, 141—196.

Trespasser attempting to perpetrate fraud by beating way on top of train may recover for violence of brakeman. *Ibid*, 141—195.

Punitive damages for malicious prosecution do not necessarily arise if jury finds issue of malice against defendant, but they must find the wrongful act was done from actual malice in sense of insult, rudeness or oppression. *Stanford v. Grocery Co.*, 143—421.

Defendant is liable for punitive, in addition to compensatory damages, when engineer wilfully refuses to stop train at flag station, where it should have been stopped

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under circumstances. *Williams v. R. R.*, 144—499.

Exemplary damages in libel and slander, proper, when act complained of was conceived in the spirit of mischief or of criminal indifference to civil obligations. *Logan v. Hodges*, 146—44.

Master not liable for punitive damages for wanton act of servant in absence of evidence of ratification or negligence of master in selecting a reckless servant. *Stewart v. Lbr. Co.*, 146—52.

Master is only liable for punitive damages for act of servant when he acts within scope of his employment. *Ibid*, 146—54.

Punitive damages are never awarded for compensation, but only for punishment of offender who actually or by legal construction participated in offense. *Ibid*, 146—54.

Where dead body was struck by passing trains and dismembered portions were scattered along track for 24 hours, punitive damages proper if jury find this was wantonly done. *Kyles v. R. R.*, 147—401.

Action for attempted seduction of wife lies in favor of husband, and vindictive damages may be assessed. *Brame v. Clark*, 148—367.

To constitute a willful injury, the act which produced it must have been intentional, and must have been done under such circumstances as evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of. *Bailey v. R. R.*, 149—174.

In action for exemplary damages for alleged willful failure to comply with contract to run excursion for plaintiff, and jury found under competent evidence that defendant was not guilty of any breach of duty, this puts an end to the action and question of punitive damages cannot arise. *McColman v. R. R.*, 150—709.

Remote.—Recovery of damages for burning plaintiff's vessel by fire caused by water reaching lime on

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board, on account of defective work in repairing vessel, is too remote in absence of evidence that defendant knew vessel was to be used for carrying lime. *Bell v. Machine Co.*, 150—113.

Special.—When obstruction of alley-way causes special damage to abutting owner, it gives him a peculiar interest in the matter and may sue for wrong in his own name. *Tlse v. Whitaker*, 144—508.

In action for damage to goods caused by delayed shipment, if plaintiff seeks to recover other and additional damages by reason of special facts, knowledge of same must be brought home to other party. *Development Co. v. R. R.*, 147—508.

Shipment of heavy shaft by express indicates that it was designed for present use in a mill and that some injury would result from delay in transit. *Furn. Co. v. Express Co.*, 148—97.

To recover for such special damages as may have been reasonably within contemplation of parties, they must be both pleaded and proven. *Sloan v. Hart*, 150—275.

Where nuisance complained of does not involve any physical interference with personal or proprietary rights of another, recovery can not be had, even for nominal damages, by simply showing that a nuisance has been created or maintained; but plaintiff must go further and show that it has injuriously affected him in some substantial right or there is imminent danger that it will do so. *McManus v. R. R.*, 150—661.

Speculative.—In action for breach of warranty as to sawmill machinery, purchaser can not recover for loss of profits in lumber contracted to be sold if contract was not known to seller. *Mfg. Co. v. Machine Works*, 144—691.

Measure of damages for breach of contract, stated. *Wilkinson v. Dunbar*, 149—22.

Profits of an old established business may sometimes be allowed as

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damages, when they can be ascertained with a reasonable degree of certainty, and, under like circumstances, the prospective profits to arise from the contract declared on are also recoverable. *Ibid*, 149—22.

Where one's property has been taken by claim and delivery and his business wrongfully interrupted for a definite time, and to an extent that plaintiff could not lessen it by reasonable effort, and during such time he could have delivered a definite amount of lumber at certain profit, such loss would be sufficiently certain for jury. *Bowen v. King*, 146—394.

Evidence of damage sustained here is speculative and too remote. *Coles v. Lbr. Co.*, 150—188.

Dead Body.

See Executors and Administrators, injury to body.

Death by Wrongful Act.

See Executors and Administrators, wrongful death.

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Generally.—When mortgage was transferred, but not mortgage debt, assignee may be regarded as having interest in debt for which note and mortgage were securities. *Chemical Co. v. McNair*, 139—332.

One indebted can not devise contingent limitations to parties not in esse to prevent sale for his debts. *Carraway v. Lassiter*, 139—145.

Imprisonment for.—There can be no imprisonment to enforce payment of a debt under final process, unless it has been found upon allegation made in complaint and corresponding issue submitted to jury that there has been fraud, and judgment entered in conformity therewith. *Ledford v. Emerson*, 143—527.

Situs of.—For purpose of attachment and jurisdiction, situs of debt is at debtor's residence, where he may be personally served with process. *Wierse v. Thomas*, 145—267.

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Decedent.

See Executors and Administrators.

Deceit.

See Fraud and Mistake.

Declarations.

See Evidence, declarations.

Decree.

See Judgment.

Dedication.

See Roads and Streets, dedication.

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Generally.—In proceeding for partition, evidence tending to show mutual mistake in deed, under which defendant claimed, incompetent. *Buchanan v. Herring*, 141—39.

Grantee in deed, in which wife does not join, cannot cut timber. *Bynum v. Wicker*, 141—95.

Party claiming land to be within exception must take the burden of proving it. *Lumber Co. v. Cedar Co.*, 142—412.

Deed to land made by foreign executors under authority of will, void in this State unless executors qualify here, and operates only as assignment of debt and security. *Scott v. Lumber Co.*, 144—44.

Grantor has conveyed what he promised to sell, when he executes perfect paper title to grantee, although one is in possession without lawful claim. *Fishel v. Browning*, 145—78.

Where testator and first wife gave deed and will to defendant, who kept both, without registration, till testator's death, and afterwards another will conveying everything to second wife was executed, defendant is owner of land described in deed. *Smithwick v. Moore*, 145—111.

Where one has set up a deed as foundation of his title, and, without amendment of his complaint, when he finds it does not serve his pur-

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pose, he cannot attack it by parol evidence. *Webb v. Borden*, 145—194.

A deed with two endorsements thereon, executed contemporaneously, each bearing signature and seal of grantors, duly probated and registered together, must be considered as intended for one deed. *Bryan v. Eason*, 147—289.

Where both parties claim title from a common source, plaintiff does not have to show title out of the State. *Warren v. Williford*, 148—477.

Freehold may be made to commence in futuro, and reservation of title during grantor's life was a reservation of the possession. *Dick v. Miller*, 150—64.

While execution of deed in manner prescribed when corporate seal is affixed, is presumed to be authorized, but this may be rebutted when executed to company's officers. *Edwards v. Supply Co.*, 150—173.

Alteration.—Erasure of one's name in deed and substitution of another's, without knowledge or consent of grantor, and registration in this form, conveys no title to new grantee. *Perry v. Hackney*, 142—368.

Appurtenances.—Only incorporeal rights pass as appurtenant to land. *Latta v. Elec. Co.*, 146—277.

If one sells land on which a mill is located, an easement will pass with it as appurtenant to pond of water above the mill to the same extent as was done at the time of conveyance, and easement does not extend to other lands purchased for use with mill simply as an appurtenance, without an express grant. *Ibid*, 146—298.

A right or easement does not pass as appurtenant without mention, unless it is an existing easement actually appurtenant by use and occupation at time of conveyance. It must actually belong to the estate conveyed in order to pass by implication. *Ibid*, 146—300.

Boundaries.—Court should instruct jury what boundaries are, leaving to them the question where

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they are. *Jennings v. White*, 139—22.

See also: *Gudger v. White*, 141—508.

Where call in deed is for certain distance to known fixed line of another tract, distance will be disregarded and line will control. *Ibid*, 139—22.

Where party claims marked line actually run and corner made by surveyor, he holds accordingly, notwithstanding misdescription of land. *Hill v. Dalton*, 140—9.

In processioning proceeding, lines of senior grant, the controlling object, cannot be established by lines of junior grant. *Ibid*, 140—9.

When natural boundary is called for in patent or deed, line terminates at it, however wide of course called for it may be, or however short or beyond distance specified. *Ibid*, 140—9.

When it is proved that marked line was actually run by surveyor, and corner made, and party claiming under deed holds therewith, it pre-supposes deed made in pursuance of survey. *Fincannon v. Sudderth*, 140—246.

Evidence of common reputation of private boundary should be remote and always ante litem motam. *Bland v. Beasley*, 140—628.

To establish common reputation of boundary, error to permit witness to testify that he knew the line "from what people said," where only person he ever heard say so was alive and witness in the case. *Ibid*, 140—628.

Declaration of disinterested person, now dead, made ante litem motam, that an oak was the corner of tract in question, competent. *Bullard v. Hollingsworth*, 140—634.

When a pond has become permanent by long, continuous use, it acquires a well-defined boundary, and there is no presumption that such pond, in the call of a deed, extends to the thread of a stream. *Guano Co. v. Lumber Co.*, 146—187.

Land bounded on a pond extends

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only to the margin, and the margin of the pond as it existed at time of conveyance is the limit, whether the pond was then in its natural state or raised above it by a dam. *Ibid*, 146—189.

In ejectment, where first call of deed is "beginning at a stake on the south bank" of a branch which had changed its bed 18 feet since date of deed, proper for jury to consider location of branch to locate beginning point. *Land Co. v. Lang*, 146—313.

In effort to locate beginning corner of lot, if corners of lines further on are located, the courses and distances may be reversed and run backward to find the lost corner or beginning. *Ibid*, 146—314.

A stake is not a natural boundary, and in absence of natural objects or other well known lines, course and distance will control. *Tate v. Johnson*, 148—271.

When call is for certain distance from ascertained corner to stake, and further description of line is not met, the stake and distance do not control, when survey had been made of this and adjoining tract the same day by owners of both tracts, including dividing line in dispute, and this line is identical as to calls, courses and distances in both deeds, it is for jury to find location of disputed line. *Ibid*, 148—275.

Generally, where one enters into land under a claim of title by deed, his entry and possession are referred to such title, and his seisin is deemed co-extensive with boundaries stated in his deed, where there is no adverse possession of any part of the land so described in any other person. *Haddock v. Leary*, 148—380.

If calls of deed are sufficiently definite to be located by extrinsic evidence, location cannot be changed by parol agreement, unless agreement was contemporaneous with making of deed. *Ibid*, 148—380.

When grantee in deed is seated upon a part only of land covered by its boundaries, he must claim its

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boundaries in order to ripen by possession his title to the whole. He must claim the right and title to the whole land, in order that his constructive possession may extend to the whole. *Ibid*, 148—381.

Where plaintiff in action for trespass failed to show chain of title by deed and endeavored to make prescriptive title by color and possession, competent to prove a line agreed upon between plaintiff and defendant's ancestor and that plaintiff did not claim any right or possession beyond it, before plaintiff's colorable title had ripened. *Ibid*, 148—381.

Recognition of and acquiescence in a line as the true boundary line of one's land, not induced by mistake, and continued through a considerable period of time, affords strong, if not conclusive, evidence that the line so recognized is the true line. *Haustein v. Ferrall*, 149—244.

One may testify in action of ejectment that he has heard a natural boundary, called for in the grant, called by a certain name. *McNeely v. Laxton*, 149—333.

In determining length of calls of grant, as length was not stated in grant but was given in an annexed plat, competent for jury to consider the distance as specified in the plat in locating that line. *Ibid*, 149—335.

Rule as to locating boundaries, when only course and distance is given, stated. *McNeely v. Laxton*, 149—335.

In action to recover land, when controversy is dependent upon true location of lands described in certain grant, jury are not confined, necessarily, to location of lines of other tracts called for in grant, which are not themselves located. *Ibid*, 149—335.

When there is a definite call in a grant or deed for a corner or line of another tract, which is known and established, such call will control the course and distance, unless it is made to appear that with a view of making the deed, and by

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physical survey, a different corner was established, or a different line was actually run and marked, and instrument was executed by grantor with the intent, at the time, to convey land according to this actual survey. *Mitchell v. Welborn*, 149—349.

Judge's charge in action to recover land where there are disputed boundaries, approved. *Lance v. Rumbough*, 150—24.

Where two natural boundaries are called for at same place, and only one can be found, jury should be guided by natural boundary located. The line of another tract of land is a natural boundary, provided, at time deed called for it is made, the line is located by visible marks, or if it can in any other way be located. *Ibid*, 150—22.

An instruction is erroneous when its effect is to ignore the calls of a grant under which one claims, and adopts a line from a fixed corner subsequently made by surveyor by construction and not by actual survey upon which patent was issued. *Land Co. v. Erwin*, 150—43.

To establish disputed corner, deed from deceased offered as a declaration tending to establish it, must have come from a disinterested person, made ante litem motam, by a declarant who is now dead. *Lumber Co. v. Branch*, 150—241.

In action to recover possession, evidence of another deed giving a line as contended by plaintiff, written by witnesses in defendant's absence and without her request, is incompetent. *Brown v. Myers*, 150—444.

Commissioner to sell land for partition cannot extend or change boundaries contained in decree, but he may make more specific and certain the description of land sold by him. *Balliere v. Shingle Co.*, 150—634.

Breach of Covenants.—Covenant of seisin broken, if at all, upon delivery of deed, and covenantee may sue upon it though he had parted with title. *Eames v. Armstrong*, 142—507.

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In action against insane person for breach of warranty in deed, witness not interested in recovery is competent, though he may have interest in the land. *Lemly v. Ellis*, 143—200.

When existence of a public right of way over land is fully known at time of purchase, its continued existence is no breach of covenant of quiet enjoyment, or against encumbrances. *Tise v. Whitaker*, 144—508.

Where one claiming under husband, conveys by deed with covenant of seisin, outstanding right of dower in widow does not work breach of covenant. *Fishel v. Browning*, 145—71.

Measure of damage for breach of several covenants, discussed. *Ibid*, 145—72.

Covenant of seisin refers to title, not possession. *Ibid*, 145—75.

Breach of covenant of quiet enjoyment occurs when there is an eviction or disturbance of possession by title paramount. *Ibid*, 145—75.

Eviction by superior title cannot take place when grantee has made no entry under his deed. *Ibid*, 145—76.

Where one covenants to indemnify against all persons, this is but a covenant to indemnify against lawful title. *Ibid*, 145—78.

Right of dower is such an encumbrance upon land as works a breach of covenant. *Ibid*, 145—79.

Covenant of seisin extends only to guarantee the bargainee against any title existing in a third person and which might defeat estate granted. *Eames v. Armstrong*, 146—4.

When contract to sell land was entire, and title to one of several tracts was defective, measure of damages is proportion the value of land covered by paramount title bears to the whole, estimated on consideration paid. *Lemly v. Ellis*, 146—222.

Where warranty of title was defective, but vendee has procured a good title, basis of recovery would be amount reasonably paid to buy in outstanding title; if it did not

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exceed purchase money. *Ibid*, 146—222.

See also: *Eames v. Armstrong*, 146—9.

Cancellation.—Executor's deed for testator's land will not be set aside in absence of collusion or fraud, at instance of some of distributees, who claim they have not received their share of assets, where executor is solvent and has other assets out of which they may recover any amount due them. *Sprinkle v. Holton*, 146—258.

Where plaintiff alleged that mortgage debt had been paid and brought action to cancel mortgage and tax deed obtained by mortgagee, correct procedure was to ascertain amount due, if any, so that plaintiff could redeem or mortgage be foreclosed. *Cauley v. Sutton*, 150—330.

Clauses.—Habendum shall never introduce one who is a stranger to the premises, or cut down an estate in fee to a life estate; it may be used to explain, enlarge or qualify the premises, but not totally contrary or repugnant. *Condor v. Secrest*, 149—204.

Stranger to premises cannot be introduced in habendum to take as grantee, yet he could take in remainder by way of limitation. *Ibid*, 149—205.

"Unto the said M. and her heirs forever," in premises, and "to have and to hold the same, together with all privileges and appurtenances thereto belonging to herself, the said M. during her lifetime, and at her death said land is to be equally divided between the children of the said M.," in the habendum, gives her a life estate, notwithstanding the use of the word "heirs" in premises. *Triplett v. Williams*, 149—395.

Doctrine which regarded granting clause, habendum and tenendum as separate and independent portions of same instrument, each with its especial function, is becoming obsolete, and a more liberal construction obtains, which looks at whole instrument to ascertain intention of parties. *Ibid*, 149—396.

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Collateral attack.—Where defendants claim that their co-defendant, a corporation, was insolvent at time of execution of its deed, burden is upon them to show that company was insolvent and that they, as creditors, are in position to attack deed. *Latta v. Elec. Co.*, 146—304.

Conditions in.—One who prevents performance of condition, or makes it impossible by his own act, cannot take advantage of non-performance. *Harwood v. Shoe*, 141—161.

Where failure of grantee of deed to carry out contract of maintenance with grantor was due to act of heirs at law of grantor, they cannot profit by their wrongful act, though not parties to contract. *Ibid*, 141—161.

When a conveyance of land leaves in doubt whether clause is intended as a covenant or a condition subsequent, it will be construed as a covenant, when possible. *Church v. Bragaw*, 144—126.

Upon failure to perform condition that its line of road shall be completed within five years, equity will not relieve against a forfeiture because defendant, pursuant to an Act affecting its construction, concentrated its force on some other part of its line. *McDowell v. Ry.*, 144—721.

Railroad cannot avoid a forfeiture under time limit for construction of its line of road, unless it substantially complies with provision therefor in its deed. *Thomas v. Ry.*, 144—729.

When a condition is relied upon to work a forfeiture, it must appear plainly in the deed or arise by clear implication. *Braddy v. Elliott*, 146—580.

Consideration.—Whether purchase money secured by unregistered bond for title has been paid, as against holder of registered deed, is for jury. *McNeill v. Allen*, 146—285.

In deed of this character, giving on the face clear indication that an absolute estate was intended to pass by recital of valuable consideration paid or express covenant to warrant

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and defend the title, no trust would be implied or result to grantor because no consideration was paid. *Gaylord v. Gaylord*, 150—226.

Where absolute deed is made, parol evidence is inadmissible to prove that deed was made under any special trust for grantor, and that a valuable consideration was not paid. *Ibid*, 150—230.

Construction of.—Child en ventre sa mere, when deed executed, takes in common with living children. *Campbell v. Everhart*, 139—502.

Deed to "heirs" of living person passes title of grantor to children of such person. *Ibid*, 139—502.

Deed to standing timber, when timber must be cut and removed. *Hawkins v. Lbr. Co.*, 139—160.

Last repugnant clause in timber deed, rejected. *Ibid*, 139—160.

Generally, court will examine entire deed, seek to effectuate intention of grantor, but when rules of construction have been settled, duty of court to enforce them. *Wilkins v. Norman*, 139—39.

One indebted can not devise contingent limitations to parties not in esse to prevent sale for his debts. *Carraway v. Lassiter*, 139—145.

Deeds are to be interpreted so as to effectuate intention of parties as gathered from entire instrument, consistent with reason and common sense. *Gudger v. White*, 141—507.

Construction of written contract, when terms ambiguous, is for court. *Banks v. Lbr. Co.*, 142—49.

Where trust deed provides for commission to trustee for making sale, etc., and "apply the proceeds of sale to the discharge of said debt," commissions will only be allowed on amount of debt secured. *Loftis v. Duckworth*, 146—344.

Expression in deed, exempting from the conveyance the land "which is still retained by her," construed. *Featherston v. Merrimon*, 148—204.

Deeds, like most other instruments, should be construed for purpose of ascertaining true intent of parties, look at whole instrument,

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take it by its four corners, and learn its meaning. *Ibid*, 148—205.

An estate to D. for life and then to heirs of S., who was then alive, is operative as to the conveyance of the remainder under Revisal, 1583, which construes word "heirs" to mean children. *Condor v. Secrest*, 149—207.

Doctrine which regarded granting clause, habendum and tenendum as separate and independent portions of same instrument, each with its especial function, is becoming obsolete, and a more liberal construction obtains, which looks at whole instrument to ascertain intention of parties. *Triplett v. Williams*, 149—396.

This instrument reciting valuable consideration, description and habendum clause, is a deed and not a will. *Dick v. Miller*, 150—63.

Where question was whether life estate or fee was conveyed, clause of warranty which contains a covenant for quiet enjoyment to grantor for life and then to his "surviving heirs," will be considered to ascertain grantor's intention. *Price v. Griffin*, 150—527.

Correction.—Evidence in action to correct deed for fraud, insufficient. *York v. Westall*, 143—276.

Plaintiff in action for recovery of land, upon proof of averment of mistake, may have deed in chain of title corrected, and facts upon which equity is claimed must be alleged. *Webb v. Borden*, 145—188.

When property was omitted from mortgage by mistake, proof must be clear and convincing that true intention of parties was not expressed. *White Co. v. Carroll*, 147—334.

Oral evidence not competent to vary written instrument to show that it had a meaning not expressed in it by the parties, but it is admissible in equity to correct it. *Ibid*, 147—334.

In action to correct a deed, if there is more than a scintilla of evidence, it is for the jury to say whether evidence was clear, cogent

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and convincing. *Cuthbertson v. Morgan*, 149—76.

Court will correct mistakes in deed in plaintiff's favor, and those against him. *Ibid*, 149—78.

Deed will be corrected to effectuate intention of parties where they made a mistake of law in inserting qualifying words in habendum instead of premises. *Condor v. Secrest*, 149—204.

Equity will correct a deed to effectuate intention of parties, when it appears, from construction of entire instrument and from action of parties, that there has been a mistake as matter of law. *Ibid*, 149—204.

Covenants.—When conveyance leaves in doubt whether clause is intended as a covenant or a condition subsequent, it will be construed as a covenant, when possible. *Church v. Bragaw*, 144—126.

Delivery.—Registration of deed raises presumption of delivery. *Smithwick v. Moore*, 145—111.

Deed made by agent having general control of principal's property, to his principal, and found in agent's safe unregistered after his death, but among other papers, etc., of his principal, without other proof of constructive or actual possession of the principal, there would be no valid delivery, when there was no special authority to agent to accept deed in behalf of principal, and failure to register was a circumstance to be considered by jury upon question of fraud. *Smith v. Moore*, 149—195.

Essential to delivery of deed that it pass out of and beyond control of grantor, and into actual or constructive control of grantee. *Ibid*, 149—195.

Presumed that this deed, proved, registered and offered in evidence by defendants, claiming under it, was executed and delivered at time it bears date, unless contrary be shown, and burden to show this is upon plaintiff. *Fortune v. Hunt*, 149—362.

Where grantor executed deed and gave it to witness "to take it up

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and keep it, and if he never called for it to deliver it to the proper person," and it was so kept till after grantor's death, there was no valid delivery. *Ibid*, 149—359.

Delivery of deed or other written instrument is very largely dependent on intent of parties at time and is not at all conclusively established by manual or physical passing of deed from grantor to grantee, and where one brother executed deed to another brother to hold same as depository or subject to control of grantor, there was no delivery. *Gaylord v. Gaylord*, 150—233.

Description.—When another line is called for and distance gives out before reaching the line called for, distance disregarded. *Hill v. Dalton*, 140—13.

See also *Jennings v. White*, 139—22; *Whitaker v. Cover*, 140—280; *Fincannon v. Sudderth*, 140—246.

Description by name, where lands have known name, sufficient. *Moore v. Fowle*, 139—51.

Description of land, valid. *Ibid*, 139—51.

In support of description, reference to other deeds sufficient and competent to locate land. *Ibid*, 139—51.

Description of land, when too vague. *Smith v. Proctor*, 139—314.

Where deed from trustee refers to deed of trust, and gives further description, parol evidence admissible in aid of description. *Hinton v. Moore*, 139—43.

In processioning proceeding, what course and distance governs. *Hill v. Dalton*, 140—9.

Power of attorney to sell "all of our land in State of North Carolina" sufficiently definite. *Janney v. Robbins*, 141—400.

Where one deed refers to another for description, latter to be taken as if embodied in other deed. *Gudger v. White*, 141—507.

Grant of land bounded by non-navigable creek or river carries grantee to middle of stream. *Wall v. Wall*, 142—387.

"Beginning at a pine on east side

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of Gum Swamp," is sufficiently definite to admit parol evidence of description in grant or deed. *Broadwell v. Morgan*, 142—475.

Evidence in this case of location of beginning point, sufficient. *Ibid*, 142—475.

Standing trees are part of realty, and conveyance of title thereto has to be sufficient to convey realty; and contract for cutting timber, without proper words of conveyance and a sufficiently definite description of land upon which same is standing, is void against purchasers for value under sufficient deed subsequently registered. *Tremaigne v. Williams*, 144—114.

In action involving disputed boundary, testimony of surveyor that at time of making deed an actual survey was had in presence of purchaser, corners marked and lines run, is competent, and one claiming under such deed holds according to survey. *Fincannon v. Sudderth*, 144—587.

Where one makes an entry so vague as not to identify the land, entry does not amount to notice and gives no priority of right as against one who makes an entry, has it surveyed and takes a grant. *Fisher v. Owen*, 144—653.

Not permissible to use option to aid description in deed. *Modlin v. R. R.*, 145—223.

Where general description in deed follows a specific one, it controls the former to the extent required to reconcile the two, and in subordination to the principal that clauses should be given effect as far as they can be harmonized by fair and reasonable interpretation. *Ibid*, 145—222.

If plaintiff's entry is vague after survey and issue of grant by State, it is not open to defendant to attack it. *Call v. Robinett*, 147—617.

Description in grant, sufficient. *Ibid*, 147—617.

"A certain tract lying and being in county aforesaid, fronting farm of A. adjoining farm of B. and others and known as the C. place, being 150 acres," is sufficiently definite,

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and it may be shown by parol that grantor had constituted thirty additional acres being locus in quo and as part of C. place for purposes of deed. *Grimes v. Bryan*, 149—250.

An entry void for uncertainty may be made certain and definite by subsequent survey, and grant based upon it will be valid. *Lovin v. Carver*, 150—711.

Escrow.—Title of grantee under deed in escrow is a legal one, especially if deed is rightfully delivered to him. *Craddock v. Barnes*, 142—90.

Escrow relates back to date of original execution and when grantor delivers to depository, no delivery necessary by him after condition performed. *Ibid*, 142—90.

Estate conveyed.—When a thing is granted, everything possessed by grantor passes as incident which is necessary to make grant effectual. *Chemical Co. v. McNair*, 139—332.

Trustee takes fee by implication when duties of trust require it, although it is in terms a life estate. *Smith v. Proctor*, 139—314.

Execution.—Law affords no redress, in absence of fraud, to one who signs deed without reading, or requiring it to be read to him. *Griffin v. Lbr. Co.*, 140—520.

Deed to trust estate of wife, executed by her and husband, without intervention of trustee, a nullity. *Cameron v. Hicks*, 141—21.

Fraudulent.—In action to set aside deed for fraud, defendant had purchased interest of his co-defendant, amount of recovery stated. *Sprinkle v. Welborn*, 140—163.

In action to set aside deed for fraud, evidence competent as corroborative. *Hodge v. Hudson*, 139—358.

Deed obtained from illiterate man by fraud, proper case for jury. *Ibid*, 139—358.

Burden of proof to show transaction to be fair and honest where grantee in alleged fraudulent deed was agent, confidential friend and

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adviser of grantor. *Smith v. Moore*, 142—278.

That alleged fraudulent deed was not recorded for ten months, also that it has been on record twenty years, circumstances for jury. *Ibid*, 142—278.

When evidence disclosed that deed was executed and induced by those in friendly intercourse and habitual reliance for advice, it raises a presumption of fraud as a matter of fact, to pass before jury for its worth. *Balthrop v. Todd*, 145—114.

Evidence insufficient to justify setting aside deed for undue influence. *Myatt v. Myatt*, 149—139.

If deed is procured by fraud or undue influence of one acting as agent of grantee therein; or if grantee in such deed was a volunteer or bought with notice of the wrong done, or of facts sufficient to put man of average business prudence on inquiry that would lead to knowledge, grantor is entitled to adequate relief. *Beeson v. Smith*, 149—146.

Relief will be afforded where deed was procured by fraud, not only against the principal, where he is grantee in deed, but also against persons who were or have become beneficiaries of the fraud, when they are volunteers or purchasers with notice, or when deeds have been procured by fraud or undue influence of one who is acting as agent of grantee. *Ibid*, 149—145.

Mortgage of all its property made by corporation to its president and two directors, with authority of directors, but without any vote of stockholders, to secure them in their prior endorsement of company's notes, is void; but otherwise if mortgage had been authorized at time of loan. *Edwards v. Supply Co.*, 150—172.

That deceased grantor in deed was a colored man about seventy years old, and boarded with grantee, whom he desired to marry, to be taken care of, thus living in a lawful manner, is not such a relationship between them as will affect

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the rule that burden is upon heirs who seek to set aside deed for fraud and undue influence. *Whitlock v. Dixon*, 150—618.

Grants.—To raise presumption of grant, not necessary that possession adverse to State should be continuous and unceasing. *Bullard v. Hollingsworth*, 140—634.

As between two or more conflicting titles derived from State, elder shall be preferred. *Berry v. Lbr. Co.*, 141—386.

Grants and patents issued by the sovereign are proven by the seal and entitled to enrollment. *Broadwell v. Morgan*, 142—475.

In claim of title by right of entry on vacant land, unnecessary that protestant make out a perfect chain of title, with no link unbroken, as in ejectment. *Lbr. Co. v. Coffey*, 144—560.

Methods of affecting subsequent enterers, stated. *Fisher v. Owen*, 144—654.

In an action upon an entry upon vacant lands, burden is upon enterer or claimant, to show that land was described in his entry. *Walker v. Carpenter*, 144—676.

Where protest is filed against entry upon vacant land, enterer must make good his right as against protestant only. *Bowser v. Wescott*, 145—60.

Where protestants to entry upon State's land are in possession of locus in quo, but fail to connect their title with those under whom they claim, it is no admission of absence of title and protest should not be dismissed as against subsequent enterer. *Ibid*, 145—56.

Protest against enterer on State's land is not a civil action, but is to determine right of enterer. *Ibid*, 145—56.

See also *In re Williams*, 146—270.

Distinction with reference to registration of deeds and grants, pointed out. *Dew v. Pyke*, 145—302.

Entry upon State land gives inchoate right to call for grant, which may be divested by subsequent entry of land and grant issued thereon before first entry is taken

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out, if senior grantee had no notice of first entry. *Ibid*, 145—305.

When grant issues upon first entry, title passes out of State and land is no longer subject to entry. *Ibid*, 145—305.

Protestant to entry upon State's land may withdraw his protest, but remains a party to it, bound by judgment to extent court had power to render it, and from which he may appeal. *In re Williams*, 146—271.

Where judgment of supreme court is in favor of enterer, costs in court below should be taxed against protestant. *Ibid*, 146—272.

Burden of proof is upon plaintiff to attack defendant's grant for any cause not appearing upon its face. *Weaver v. Love*, 146—416.

Enterer upon State's vacant lands has an equity by virtue thereof and payment of purchase money, to call for deed and perfect his claim of legal title, and upon failure of him and those who claim under him to call for grant within ten years after entry, abandonment is presumed in favor of those who claim under junior grant. *Frazier v. Cherokee Indians*, 146—477.

Under facts in this case, enterer is barred by unreasonable delay. *Ibid*, 146—477.

If plaintiff's entry is vague after survey and issue of grant by State, it is not open to defendant to attack it. *Call v. Robinett*, 147—617.

When description under which entry is made is so vague as not to identify any land, entry is not void, and defect may be cured by survey, so as to make grant which issues in pursuance thereof valid as against the State. *Ibid*, 147—617.

If grant is valid against the State, it can not be attacked by a stranger to it. *Ibid*, 147—617.

When an entry is made and subsequent thereto another person lays an entry and takes a grant, he acquires the title and grantee will be declared trustee for first enterer, and entry must be sufficiently definite to put second enterer on notice. *Ibid*, 147—618.

When entry upon State's vacant

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land is too vague to give notice of land intended to be appropriated, doubtful whether it may be aided by parol. *Ibid*, 147—619.

Plaintiff having the first entry, first survey and first grant, is owner of land. *Ibid*, 147—619.

When there are two claimants to land under different deeds which include a part of land in both, there is color of title in junior grantee, and if he can show adverse possession for seven years, it will bar right of entry of other party. *Currie v. Gilchrist*, 147—652.

When defendant, under Revisal, sec. 1905, is claiming to lay an entry, and asks a grant for land admitted to be the same as contained in plaintiff's grant, plaintiffs entering their protest that land lay in one county, and defendant contending that it should be dismissed for that it lay in a different county, this fact can be tried by a jury in the pending action and it is not necessary to resort to ejectment after defendant has perfected his grant. *Ullery v. Guthrie*, 148—421.

Enterer can not recover where he fails to show that lands are vacant and unappropriated. *Babb v. Mfg. Co.*, 150—140.

Heirs.—If word "heirs" appears in premises, habendum or warranty, it will be transferred to that portion of deed which will cause same to operate as fee. *Smith v. Proctor*, 139—314.

Estate of inheritance would generally pass without use of word "heirs" if such was clear intent of parties. *Smith v. Proctor*, 139—314.

Prior to 1879, word "heirs" generally necessary to create fee, but not so in devises or equitable estates. *Ibid*, 139—314.

Deed conveying legal estate without word "heirs," conveys fee if it contains conclusive, intrinsic evidence that fee was intended and word "heirs" omitted by mistake. *Ibid*, 139—314.

Revisal, 946, does not create fee without use of word "heirs," where it shall be plainly intended by the

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conveyance or some part thereof that grantor meant to convey an estate of less dignity. *Sprinkle v. Spainhour*, 149—225.

"Unto the said M. and her heirs forever," in premises, and "to have and to hold the same, together with all privileges and appurtenances thereto belonging, to herself, the said M. during her lifetime, and at her death said land is to be equally divided between the children of the said M," in the habendum, gives her a life estate, notwithstanding the use of the word "heirs" in premises. *Triplett v. Williams*, 149—395.

Husband's.—Where husband conveys portions of his land without joinder of wife, but retains lands which would descend to his heirs, equity requires that dower be assigned in lands descended. *Harrington v. Harrington*, 142—521.

Lappage.—As between two or more conflicting titles derived from State, elder shall be preferred. *Berry v. Lbr. Co.*, 141—386.

If junior grantee has been in adverse and continuous possession of lappage for seven years prior to bringing of action, and senior grantee has not been in actual possession of any part thereof, junior grantee has title and lappage is regarded as separate and distinct tract and color will ripen perfect title by sufficient adverse possession. *Currie v. Gilchrist*, 147—652.

Lost.—In action to establish lost deed, evidence of third person, under whom plaintiff does not claim that he had no interest in property, incompetent. *Jones v. Ballou*, 139—526.

Action to establish lost deed, record of which was destroyed, may be brought before clerk, or in superior court. *Ibid*, 139—526.

Where wife bought land and her deed was lost before registration, and husband, after her death, procured deed to himself, he is a trustee for his children. *Norcum v. Savage*, 140—472.

Mental capacity to execute.—It requires more mental capacity to

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execute deed than a will. *Bond v. Mfg. Co.*, 140—381.

In action to set aside deed for mental incapacity, record of annulment of plaintiff's marriage for lack of mental capacity, incompetent as substantive evidence. *Sprinkle v. Welborn*, 140—164.

In action to set aside deed for want of mental capacity, grantor had attacks, prior and subsequent to its execution, which deranged her, plaintiff must show that she had sufficient capacity at time of execution of deed. *Hudson v. Hudson*, 144—449.

Partnership.—Deed to partnership, in which partners are not named, is valid. *Walker v. Miller*, 139—453.

Plats.—Where defendant agrees to convey lot of land shown on plat, and executed a deed for fifteen acres by metes and bounds differing from those on plat, rights of parties are to be determined by acreage shown on plat. *Rivenbark v. Teachy*, 150—292.

Prepared by vendor.—When vendee undertakes to have his attorney prepare deed, it is a waiver of obligation of vendor to tender one. *Hardy v. Ward*, 150—393.

When thirty-day option to purchase timber has been given for nominal consideration, providing for cash payment and notes for balance of purchase price, tender of payment upon specified terms is necessary, and mere acceptance within the time will not suffice. *Ibid*, 150—391.

Option to purchase timber upon condition when vendee should signify his acceptance within time specified, and vendor should at once prepare deed and deliver it upon compliance with terms of sale, makes it the duty of vendor to tender deed within the time, unless it was waived. *Ibid*, 150—391.

Privity.—In cases of privity of estate, title passes by devise, descent or deed. *Jennings v. White*, 139—27.

Probate.—Acknowledgment and

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privity examination of married women to conveyances of land by proper officer, though employee of grantee, valid if he have no interest in land conveyed. *Smith v. Lbr. Co.*, 144—47.

Purchasers for value under a sufficient and registered deed are not affected with notice by possession of those under a prior deed if invalid or registered upon an invalid probate. *Tremaine v. Williams*, 144—114.

Magistrate can not correct his certificate to deed after expiration of his term of office. *Cook v. Pittman*, 144—530.

Deed made by husband and wife is not "color" of title when certificate does not show that husband acknowledged its execution, or that privity examination of wife had been taken, it not appearing that it was offered as a common law deed for purpose of color. *Ibid*, 144—530.

Where married woman at time of signing contract to convey land, believed it conveyed only the timber, and before its execution she was correctly informed as to its contents, privity examination related back to signing of deed. *Lbr. Co. v. Leonard*, 145—339.

Certificate of examination of married woman in due form, supported by evidence, can only be attacked by clear, strong, cogent and convincing proof. *Ibid*, 145—340.

Where judicial act of magistrate in taking acknowledgment is being inquired into, and feme defendant alleges its execution through mistake, it is competent to show by officer that if she had made any such statement of her mistake at time he would not have probated deed. *Ibid*, 145—339.

In action attacking private examination in deed, error to charge that "burden of proof is upon defendant to show her contentions by greater weight of evidence." *Ibid*, 145—340.

Certificate of privity examination shuts off all inquiry into fraud, duress or undue influence in the

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treaty, unless participated in by grantee or his agent. *Ibid*, 145—345.

See also *Davis v. Davis*, 146—165.

Probate of deed which omits to adjudge that a certificate "is in due form and according to law" makes the registration without authority of law and of no effect. *Johnson v. Lbr. Co.*, 147—250.

It is presumed that a seal was affixed to original deed where certificate reads "given under my hand and seal." *Ibid*, 147—251.

Certificate of justice to privy examination is a judicial act, and ought to stand unless evidence offered to set it aside is clear, strong and convincing. *Davis v. Davis*, 146—165.

Presence and undue influence of husband will not avoid legal effect of privy examination, made by one qualified to take it, unless grantee is fixed with notice. *Ibid*, 146—165.

Solemn acts of judicial officers in taking examinations of deeds are not to be lightly set aside, and never upon a mere preponderance of evidence, but only upon clear, strong and convincing proof. *Ibid*, 146—166.

Acknowledgment and privy examination of wife to deed made in 1857, and before execution was proved as to husband, probate was defective. *Bryan v. Eason*, 147—290.

Probate of deed prior to 1893 should adjudge that instrument was duly acknowledged or proved, but it is sufficient now if certificate is "adjudged to be correct." *Cozad v. McAden*, 148—12.

Registration of deed upon certificate of officer, without adjudication of clerk, is invalid, and deed is not competent evidence. *Ibid*, 148—12.

When acknowledgment of deed has been made before an officer authorized to take it, and was in fact in due form, and the deed, with a proper certificate, has been presented for probate to resident clerk, who examines same and adjudges it to be correct, such certificate and order constitute a valid probate. *Cozad v. McAden*, 150—210.

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Quitclaim.—Subsequently acquired outstanding title enures to grantee in deed of bargain and sale, contra as to quitclaim. *Weeks v. Wilkins*, 139—215.

Quitclaim deed, containing no covenants, vests in grantee only such title as grantor was seized of then. *Ibid*, 139—215.

See also *Lbr. Co. v. Price*, 144—50.

Quitclaim deed for land reciting invalid tax deed as source of title made by plaintiff to defendant, is not an equitable estoppel in pais, and plaintiff may assert its rights under registered deed therefor to timber growing on land. *Ibid*, 144—50.

Quitclaim deed does not pass subsequently acquired interest. *Ibid*, 144—54.

See to same effect, *Tise v. Whitaker*, 144—508.

Quitclaim deed is no estoppel upon grantee so as to preclude him from denying that he received any estate by the deed. *Bryan v. Eason*, 147—293.

Recitals in.—Where one deed refers to another for description, latter to be taken as if embodied in other deed. *Gudger v. White*, 141—507.

Recital of payment of consideration in deed controls in absence of evidence to contrary. *Griffin, ex parte*, 142—117.

Recital in body of grant, as recorded, of affixing of seal is sufficient, though no imitation of Great Seal is copied of record. *Broadwell v. Morgan*, 142—475.

Consideration expressed in deed is prima facie evidence of actual consideration, and not conclusive. *Faust v. Faust*, 144—383.

See, to same effect: *Satterfield v. Kindley*, 144—458; *Campbell v. Everhart*, 139—503.

Repugnant clauses in.—Deed to standing timber, when timber must be cut and removed. *Hawkins v. Lumber Co.*, 139—160.

Last repugnant clause in timber deed, rejected. *Ibid*, 139—160.

Where there are repugnant

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clauses in deed, first will control and last will be rejected. *Wilkins v. Norman*, 139—40.

Where estate in fee is given grantor in premises and habendum, and warranty in harmony with preceding parts of deed, repugnant clauses void. *Ibid*, 139—40.

Estates conveyed in premises and habendum different, but not repugnant, discussed. *Bryan v. Eason*, 147—291.

Restraint upon alienation.—Devise to daughter and her heirs forever, gave a fee, and subsequent clause providing that "above devised lands shall not be disposed of, but shall descend to the children of my above mentioned daughter," is contrary to public policy and void. *Foster v. Lee*, 150—688.

Right of way.—Deed to right of way gives railroad no more rights than if acquired by condemnation. *Shepard v. R. R.*, 140—391.

Tax.—Conditions precedent to acquiring tax deed must be proven outside of deed, and in absence of such proof purchaser acquires no title. *Warren v. Williford*, 148—479.

Tax deed from county commissioners to defendant without foreclosure of the certificate was a nullity. *Smith v. Smith*, 150—84.

Void.—Deed purporting to convey alleyway is void as against those having an interest therein. *Tise v. Whitaker*, 144—508.

Deed executed by foreign executors to lands here, is void unless executors qualify here. *Glascok v. Gray*, 148—349.

Voluntary.—If husband, while insolvent and indebted to wife, pays money to her for alleged loan, burden is upon her to show that he owed her a debt—one for recovery of which she could have maintained an action against him and enforced payment, and that money was received by her in discharge of debt. *Parker v. Fenwick*, 147—529.

Delivery.—See Deeds, delivery; Contracts, performance.

Demand.—Where mortgagor of

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chattel left in possession has done nothing to jeopardize mortgagee's right, demand is necessary before action will lie at mortgagor's expense. *Smith v. French*, 141—1.

In action to recover mortgaged property, evidence of demand sufficient. *Ibid*, 141—1.

DEMURRER.

Generally.—Contract of sale was made with plaintiff "and others." Demurrer sustained where associates not joined. *Winders v. Hill*, 141—694.

No law permits tender of judgment for nominal damages as aid to defective demurrer. *Hall v. Tel. Co.*, 139—369.

Where demurrer to complaint is sustained, and an amended complaint filed and answered, judgment upon demurrer is no estoppel. *Thomasson v. R. R.*, 142—317.

Complaint alleging negligence generally, demurrable. *Ibid*, 142—318.

See also: *Taylor v. Ry.*, 145—406; *Ball v. Paquin*, 140—83.

Error in trial court to sustain demurrer to complaint alleging that defendant unlawfully obstructed a public crossing with a freight train, which was proximate cause of injury to plaintiff when his horse was running beyond his control, though mere obstruction at time did not constitute negligence. *Duffy v. R. R.*, 144—26.

Demurrer to complaint alleging false parol testimony as to material fact upon trial of former and different action between same parties is properly sustained. Equity requires party seeking it to be free from laches, and production of higher grade of evidence than mere parol. *Moore v. Gulley*, 144—81.

Where chief ground of demurrer covers cause of action upon stay bond, it is to that extent severable and may be sustained as to sureties and disallowed as to principals. *Blackmore v. Winders*, 144—212.

All rights in demurrer waived, when it is not acted upon and answer subsequently filed. *Moseley v. Johnson*, 144—258.

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Demurrer can never be aided by separate averments of facts therein, but must be addressed solely to those alleged in the pleading attacked. *Wood v. Kincaid*, 144—393.

Demurrer will not be sustained when it can be seen by liberal construction that complaint states a good cause of action. *Ibid*, 144—393.

"Speaking demurrer" avers any fact not stated in pleading which is attacked, and is never allowed. *Ibid*, 144—395.

One cannot demur to plaintiff's cause of action and call in aid the averments of his own pleading, unless they admit the allegations of complaint. *Oldham v. Rieger*, 145—259.

Question of venue differs from that of jurisdiction, which can be raised only by demurrer. *McCullen v. R. R.*, 146—569.

Demurrer of several defendants will be overruled if complaint states cause as to either of them. *Caho v. Ry.*, 147—23.

When demurrer to whole cause of action or whole defense is either overruled or sustained, appeal lies, but not where demurrer as to one cause of action is sustained. *Shelby v. Ry. Co.*, 147—538.

Demurrer will be denied, when complaint states defective cause of action which may easily be remedied by amendment, if necessary. *Poythress v. R. R.*, 148—396.

On appeal from a judgment on a demurrer, assignment of error should specify grounds set out in the demurrer which will be relied upon on appeal. If only one, that should be specified, else the demurrer is general and is to be disregarded. *Ullery v. Guthrie*, 148—419.

Where action dismissed upon demurrer, statements in complaint will be accepted as true and interpreted in light most favorable to plaintiff. *Smith v. Hartsell*, 150—75.

Demurrer admits facts set out in complaint. *Jones v. North Wilkesboro*, 150—649.

In action for injunction against

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city acquiring property for watershed, which property will create an alleged nuisance, demurrer on ground that it does not appear that plaintiffs applied to commissioners to rescind contract of purchase, will not be sustained. *Ibid*, 150—649.

Another action pending.—Plea in abatement properly overruled, where at time of issue of summons herein, another action between same parties was pending in United States circuit court, and non-suit was entered therein before complaint filed. *Kesterson v. R. R.*, 146—277.

Pendency of suit, in personam, in State court, which has not gone to judgment, may not be pleaded in abatement of suit between same parties for same cause of action in federal court. *Ibid*, 146—277.

Plea in abatement must aver and prove affirmatively show, that former action is still pending at time of filing plea. *Ibid*, 146—278.

When same relief can be afforded in former action between same parties as in present action, latter action should be dismissed; and it is immaterial what the position of respective parties on record in two suits may be, if full relief can be had in first action. *Emry v. Chapell*, 148—332.

Defect of parties.—Objection for defect of parties must be made by demurrer or answer. *Bridgers v. Staton*, 150—221.

Frivolous.—Judge has discretion to permit answer to be filed, after demurrer was overruled, even if frivolous. *Parker v. R. R.*, 150—435.

Frivolous demurrer "raises no serious question of law." *Morgan v. Harris*, 141—359.

Misjoinder of parties.—Action for wrongful conversion of assets by corporation and another may be brought against them together. *Oyster v. Mining Co.*, 140—135.

Where demurrer sustained and no order made directing another to be made party, no appeal lies now. *Bernard v. Shemwell*, 139—446.

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In misjoinder of parties plaintiff, surplus party taxed with costs incurred. *Pritchard v. Mitchell*, 139—54.

In action for wrongful death, complaint not demurrable because it joins lessor and lessee companies. *Carleton v. R. R.*, 143—44.

Ore tenus.—When complaint does not state a cause of action, defect is not waived by answering, and defendant may demur ore tenus, and court may take notice of defect ex mero motu. *Garrison v. Williams*, 150—676.

When sustained.—Where demurrer sustained, appellant should note exception and present it for review from final judgment. *Bernard v. Shemwell*, 139—447.

DEPOSITIONS.

Generally.—When by agreement depositions were read upon trial and plaintiff subsequently testified that witness was at home sick, for purpose of showing that she was unable to attend in person, is harmless. *Whitehurst v. R. R.*, 146—590.

Exceptions to.—Exceptions to a deposition, especially those relating to its regularity, should be disposed of before trial is entered upon. *Ivey v. Cotton Mills*, 143—189.

Notice of taking.—Where notice to take depositions at two different places at same time is given, one may attend at either place he desires, and deposition taken at the other will be quashed upon motion, but this may be waived by appearance of counsel and cross examination of witnesses without making objection at time. *Ivey v. Cotton Mills*, 143-189.

Opened.—Opening and allowing depositions, pursuant to notice, on a legal holiday, is proper. Distinction between holiday and Sunday as being non juridicus, discussed. *Latta v. Elec. Co.*, 146—308.

DESCENT.

Generally.—Where will gives daughter and son a tract of land, to be divided between them; and

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gives another tract to three other children for life, upon death of all devisees, entire interest descends to heirs of first daughter and son. *Steadman v. Steadman*, 143—346.

Illegitimate children.—Descendant of illegitimate child of mothers inherits from her, rather than collateral legitimate kinsman. *Bettis v. Avery*, 140—184.

Code 1281, rule 9, construed. *Ibid*, 140—184.

Effect of act legitimating colored children born prior to Jan. 1, 1868, was to allow child to inherit from father. *Ibid*, 140—184.

Courts will readily extend the term "children" to include illegitimate children where such intent appears in will and condition of parties, and more especially when, from operation of statute, the illegitimate children come clearly within descriptive words of the devise. *Harrell v. Hagan*, 147—116.

Under devise by testator to his daughter, with a limitation over, in event she should die "without leaving a lawful heir," illegitimate children of daughter, born after death of testator, and surviving their mother, take an absolute estate after her death. *Ibid*, 147—117.

Rules of.—Cohabitation meant by Revisal 1556, Rule 13 of Descents, means exclusive cohabitation, such as is usually signified by the words "living together as man and wife." *Spaugh v. Hartman*, 150—455.

Descriptions.

See Deeds, description; Mortgage, description of property.

Desertion.

See Abandonment; Divorce and alimony.

Devastavit.

See Executors and Admrs., devastavit.

Devisavit Vel Non.

See Wills, devisavit vel non.

Directing Verdict.

See Judge's charge, generally; Burden of Proof, generally; Verdict, directing.

DISCHARGE.**Discharge.**

See Master and Servant, generally; Contracts, performance.

Discovery.

See Parties, examination of.

Discretion.

See Judge, discretion of; Courts, Supreme, discretion of.

Discrimination.

See Carriers, discrimination.

Dismissal.

See Appeal, dismissed.

DISSEISIN.

To create privity of estate, it must have existed between different disseisors some such relation as ancestor and heir, etc. *Jennings v. White*, 139—22.

To make disseisin effectual to give title, must appear that latter holds estate under first disseisor. *Ibid*, 139—22.

In cases of privity of estate, title passes by devise, descent or deed. *Ibid*, 139—27.

Distribution.

See Executors and Admr's., distribution.

DIVORCE AND ALIMONY.

Generally.—Affidavit in divorce case should be filed in action to annul marriage contract for incapacity. *Johnson v. Johnson*, 142—462.

Evidence sufficient in divorce. *Vandiford v. Humphrey*, 139—65.
Correct charge in divorce. *Ibid*, 139—65.

In alimony proceeding, where defendant was ordered to convey land to trustee, or to pay money into clerk's office for wife's benefit, execution of quit claim deed to trustee was not a compliance with the order, where before judgment of separation he had conveyed land to his son. *Green v. Green*, 143—406.

Knowledge of adultery need not be alleged in complaint, but in verification, and when proper affidavit

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is made, court acquires jurisdiction. *Kinney v. Kinney*, 149—325.

Absolute.—To entitle wife to divorce from husband for fornication and adultery, more than one act must be shown; the misconduct must be habitual. *Prendergast v. Prendergast*, 146—226.

Defenses.—Abandonment, condonation and recrimination, as a defense to action for divorce, should be pleaded in answer. *Kinney v. Kinney*, 149—325.

Domicile.

See Citizens; Homestead, allotment.

DOWER.

Generally.—Seisin of husband, to support dower, must be seisin in law. *Haire v. Haire*, 141—88.

Where husband's land is to be sold under first and second mortgage, and wife joined only in first, her dower is protected if land more than pays first mortgage. *Shackleford v. Morrill*, 142—221.

Where land belongs to husband he may execute second mortgage without joinder of wife, there being no docketed judgments, no homestead, though value less than \$1,000. *Ibid*, 142—222.

Where one claiming under husband, conveys by deed with covenant of seisin, outstanding right of dower in widow does not work breach of covenant. *Fishel v. Browning*, 145—71.

Upon death of intestate, his interest in timber deed devolved upon his heir, subject to right of dower in his widow. *Midyette v. Grubbs*, 145—92.

Where one holds title as a mere conduit, land cannot be subjected to payment of a docketed judgment against him, nor can his widow dower upon it. *Sutton v. Jenkins*, 147—15.

Allotment.—Where husband conveys portions of his land without joinder of wife, but retains lands which would descend to his heirs, equity requires that dower be assigned in lands descended. *Harrington v. Harrington*, 142—521.

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Widow has no right to retain possession of deceased husband's lands against heir or those claiming under him till dower allotted. *Fishel v. Browning*, 145—74.

When not allowed.—Dower not allowed in reversion or remainder expectant upon an estate of freehold. *Redding v. Vogt*, 140—562.

In proceeding for dower, where defense was abandonment, competent to ask plaintiff if she left husband of her own volition. *Hicks v. Hicks*, 142—231.

Whether wife left husband's home voluntarily, or by reason of what law calls compulsion, does not necessarily disqualify her under Rev. 1631. *Ibid*, 142—231.

Essential to creation of estate by entireties that spouses be jointly entitled as well as jointly named in the deed, and if wife alone be entitled to conveyance, and it is made to her and her husband jointly, the latter will not acquire the whole by survivorship, nor is his second wife, upon his death, entitled to dower. *Sprinkle v. Spainhour*, 149—226.

DRAINAGE.

The various statutes providing for drainage of swamps of Eastern North Carolina should, so far as practicable, be so construed as to harmonize and constitute a system of drainage laws for the State. *Adams v. Joyner*, 147—83.

Drainage laws are constitutional, and property owner should be heard before an amount for benefits derived can be charged by commissioners. *Ibid*, 147—83.

See also: *Porter v. Armstrong*, 139—179.

In action under the Drainage Act, for assessment of proportionate part against bordering owners, for needed repairs to canal, not necessary to keep case on docket, but it can be brought forward from time to time, upon notice to parties, upon supplementary petition filed therein, and further decrees made to conform to exigencies and

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changes which may arise. *Staton v. Staton*, 148—491.

Petition in proceedings brought for purpose of readjusting rights and duties of adjoining owners in draining their lands into a canal, is not uncertain because it does not re-state the termini of the canal. That sufficiently appears in original proceeding, and if it did not, petitioner should be allowed to amend. *Ibid*, 148—491.

Drunkenness.

See Railroads, injuries on tracks.

DUE DILIGENCE.

When creditor takes note of third person as collateral, he is bound to use due diligence to collect it. *Lumber Co. v. Pollock*, 139—174.

Not due diligence to rely upon assurance of officer as to when case tried, upon removal to another justice. *Bullard v. Edwards*, 140—644.

DUE PROCESS OF LAW.

Under the constitutional prohibition against imposition of excessive fines, the court has power, and in a clear case, it would be its duty to declare invalid a statute imposing penalties so enormous in amount and out of proportion to gravity of offense and its effect upon private and public interest as to come within prohibition of constitution. *Garrison v. R. R.*, 150—593.

EASEMENTS AND LICENSES.

Generally.—Statute prescribing method of procedure to condemn lands or easements are to be strictly construed, and especially when right of eminent domain is conferred upon private corporation. *R. R. v. R. R.*, 148—63.

Covenant to grant a right of way does not entitle one to a conveyance of the land. *Mills v. Lumber Co.*, 150—115.

License distinguished from easement. *Elizabeth City v. Banks*, 150—415.

Acquired.—Easement may be acquired by grant, dedication or prescription. *Milliken v. Denny*, 141—224.

EASEMENTS AND LICENSES.

Dedication of easement may be either by express language, reservation or conduct showing intention to dedicate. *Ibid*, 141—224.

Reference to an alley does not of itself impose an easement on the alley which will estop grantor from closing it up. *Ibid*, 141—225.

License granted by city to railroad to lay track upon street, in absence of express power in charter so to do, not a permanent easement. *S. v. R. R.*, 141—736.

City may make such laws controlling use of street by railroad for tracks, etc., as safety and comfort of citizens demand, where contract is merely a license. *Ibid*, 141—736.

Franchise and privileges granted by city to use streets, wharves or other public property, accepted subject to police power of city. *Ibid*, 141—736.

Improvement company not authorized to build a railroad, cannot take and use easement in right of way. Such act is ultra vires and at suit of State, its charter would be forfeited. *Beasley v. R. R.*, 145—276.

If one sells land on which a mill is located, an easement will pass with it as appurtenant to pond of water above the mill to the same extent as was done at time of conveyance, and easement does not extend to other lands purchased for use with the mill simply as an appurtenance, without an express grant. *Latta v. Elec. Co.*, 146—298.

A right or easement does not pass as appurtenant without mention, unless it is an existing easement actually appurtenant by use and occupation at time of conveyance. It must actually belong to estate conveyed in order to pass by implication. *Ibid*, 146—300.

Lessee railroad company can acquire from its lessor only such easement in right of way as lessor enjoyed, and where lessee has placed additional burden upon land for its use for purposes other than for which lot was used purely as lessee, plaintiff is entitled to per-

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manent damages in nature of condemnation. *McCulloch v. R. R.*, 146—318.

Ejectment or successive actions of trespass do not lie where railroad, having power of eminent domain, entered upon land and constructed road and has not exceeded the ultimate rights of appropriation nor violated restrictions in its charter or general laws. *Beasley v. R. R.*, 147—364.

As against rights of abutting owners, town has no right to grant railroad easement to lay its track and operate trains over streets of town, even though title to streets be in town. *Staton v. R. R.*, 147—435.

Street cannot be converted into yard for storing or deposit of cars to injury of adjoining owners. An unreasonable use of street by street railway may doubtless afford right of action to property owners specially injured thereby. *Ibid*, 147—446.

For damages incident to negligent construction of bed, recovery may be had, though right of way has been purchased or regularly acquired by condemnation. *Davenport v. R. R.*, 148—292.

Compensation for.—Measure of damages for injury done one's land by constructing railroad upon it, is a fair compensation. *Beasley v. R. R.*, 145—278.

In action for damages for placing poles and wires on plaintiff's land, measure of damage is diminution of value of land by occupation and appropriation of it to the extent of easement acquired by defendant under its charter in placing and keeping poles and wires thereon. *Wade v. Tel. Co.*, 147—221.

In action to recover for placing poles on plaintiff's land, *Revisal 1571* applies only to right conferred upon telephone companies to construct their lines along the highway. *Ibid*, 147—226.

If damages sought for taking of land for railroad purposes would necessarily be included in an assessment in condemnation proceedings, owner must pursue remedy

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provided under charter or general law. *Beasley v. R. R.*, 147—365.

Injuries to land taken for railroad use which amount to an invasion of proprietary rights of owner not covered by assessment in condemnation proceedings, must be redressed by award of permanent damages. *Ibid.*, 147—365.

In action for injuries to land taken for railroad use, where separate issues present questions of past, present and prospective damages, verdict on that account will not be disturbed, but judgment entered for whole sum. *Ibid.*, 147—366.

When abutting owner has established his right to sue as such for damages neither municipal authorities nor Legislature can confer an easement or right to use street as against property of citizen, without providing for compensation. *Staton v. R. R.*, 147—438.

Construed.—Grants of easements to railroads are construed as conveying no more than may be reasonably intended within contemplation of parties. *Beasley v. R. R.*, 145—277.

"A free and perpetual right of entry, right of way and easement," etc., for railroad purposes, conveys an easement only. *Ibid.*, 145—272.

Rights of riparian owners as to reciprocal easements, discussed. *Canal Co. v. Burnham*, 147—50.

EDUCATION.

Compulsory.—Compulsory education laws sustained when constitutionality is drawn in question. *Starnes v. Mfg. Co.*, 147—561.

EJECTMENT.

Generally.—When one takes possession under another, he may not dispute latter's title till he gives up possession. *Campbell v. Everhart*, 139—502.

Plaintiff in ejectment makes out prima facie title, when. *Ibid.*, 139—502.

In ejectment, plaintiff who has equitable interest may recover

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against wrongdoer. *Hinton v. Moore*, 139—43.

In ejectment, it may be shown that lands are not vacant. *Board of Ed. v. Makely*, 139—37.

In adverse possession, plaintiff must show privity in respect to locus in quo between himself and those whose possession preceded his. *Jennings v. White*, 139—22.

Claimant of land under "Hertford County Act" having perfect chain of deeds but without perfect title, must also show that he owns title. *Mitchell v. Garrett*, 140—397.

Judgment in ejectment, how prepared. *Crawford v. Masters*, 140—205.

In ejectment plaintiff alleges title and defendant denies it; showing a prima facie title does not shift burden of proof upon the issue, but defendant must go forward with his evidence. *Moore v. McClain*, 141—473.

In ejectment, where plaintiff after institution of action, conveys by deed in fee, error to refuse defendant's motion for nonsuit. *Burnett v. Lyman*, 141—500.

When in locating corner in ejectment, plaintiff was asked on cross-examination, for purpose of quasi-admission, if B., one under whom he claimed, and now dead, was present at time of certain survey and negatived by answer, incompetent on redirect for witness to state that B. said that was true corner, being declaration in interest. *Brooks v. Shook*, 147—630.

One in charge of mortgaged property as caretaker can not resist possessory action of trustee, when mortgagor makes no defense nor contests in its own right the validity of mortgage. *Bruce v. Mining Co.*, 147—644.

Rents accruing from land in ejectment, how applied. *Card v. Finch*, 142—141.

Where husband made party pro forma in action of ejectment by wife, he can not recover on proof that equitable title is in him. *Perry v. Hackney*, 142—368.

In ejectment, where plaintiff's sis-

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ter who had deed, died in infancy without entry, and thereafter their father took possession and held it till his death, father not presumed to have entered in behalf of his children, and there is no evidence that he had any title, his possession will not enure to them. *Barrett v. Brewer*, 143—88.

In ejectment one who claims under deed from devisee in will can not question validity of probate of will. *Steadman v. Steadman*, 143—345.

In ejectment, declarations of defendant's grantor while in possession, that she held under will of her father, competent as characterizing her possession. *Ibid*, 143—346.

When petition and answer in processioning proceeding show that controversy is real and parties are in possession of lands, claiming them as their own, concerning which boundary line is in dispute, error to dismiss proceeding for want of sufficient allegation in petition and to try case as action of ejectment merely, though title to land incidentally involved. *Green v. Williams*, 144—60.

Where plaintiff sues in ejectment and has shown title in himself, he may show acts of forcible trespass thereon of defendant, which occurred after issue of summons, as will indicate a claim of right of possession. *Land Co. v. Lange*, 150—29.

Evidence of unlawful withholding of plaintiff's property, sufficient for jury. *Ibid*, 150—29.

In action to recover possession, evidence of another deed giving a line as contended by plaintiff, written by witnesses in defendant's absence and without her request, is incompetent. *Brown v. Myers*, 150—444.

One may testify in action of ejectment that he has heard a natural boundary, called for in the grant, called by a certain name. *McNeely v. Laxton*, 149—333.

Title to support.—Plaintiff in ejectment must show good title against the world, or good against

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defendant by estoppel. *Campbell v. Everhart*, 139—502.

Defendant in ejectment has grant from State, plaintiff failed to show title out of State or color of title, error in refusing to nonsuit. *Lindsay v. Austin*, 139—463.

In ejectment, plaintiff can succeed only on strength of his own title. *Bettis v. Avery*, 140—184.

See also *Rumbough v. Sackett*, 141—495.

Not necessary to prove title out of State, in ejectment, where it is admitted that plaintiff owns all land on one side of well defined line, and defendant owns on other side. *Williamson v. Bryan*, 142—81.

If plaintiff sets out a specific chain of title, his evidence will be confined to title as alleged; and while it is not necessary to aver evidences of plaintiff's title, yet, if these be alleged, the substantial elements of the title must be stated. *McCullom v. Chisholm*, 146—23.

Where both parties claim title from a common source, plaintiff does not have to show title out of the State. *Warren v. Williford*, 148—477.

When both parties to action for possession of land claim title from common source, one of them is not estopped to show superior outstanding title, provided he connects himself with such title. *Ibid*, 148—477.

In determining ownership of land, when both parties claim title under same person, it is not competent for either, as such, to deny that such person had the title. *McCoy v. Lbr. Co.*, 149—3.

In ejectment, deed executed by wife alone, she being abandoned by her husband, is proper and necessary in making out chain of title. *Witty v. Barham*, 147—480.

In ejectment, where defendant does not show twenty years adverse possession, but plaintiff shows legal title, the law carries seizin to him, when neither is in possession. *Bland v. Beasley*, 145—169.

Where plaintiff and defendant claim title under common source, plaintiffs having shown title in A.,

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could make out their case by connecting themselves with such title and relying upon the presumption raised by Rev., 386, or failing to connect themselves with A., by showing adverse possession in themselves or those under whom they claimed. *McCaskill v. Walker*, 147—198.

When plaintiff failed to connect his chain of paper title and offers the answer as an admission that A., as a common source of title, held the locus in quo adversely, under known, visible metes and bounds, it was necessary for him to show that adverse possession of A. was sufficient in time to ripen title in him. *Ibid*, 147—199.

Summary.—Summary proceeding in ejectment is restricted to cases specified in the act, and where the relation of mortgagor and mortgagee, giving right to account, or vendor and vendee, requiring adjustment of equities, justice has no jurisdiction. *Hauser v. Morrison*, 146—249.

ELECTION.

Generally.—Election applies where there are inconsistent remedies, not to co-existing ones. *Machine Co. v. Owings*, 140—503.

Taking possession of property under will or other instrument and exercising unequivocal acts of ownership over it for a long time, will amount to a binding election. *Hogard v. Jordan*, 140—614.

Facts here not sufficient to show election. *Rich v. Morisey*, 149—44.

ELECTIONS.

Manner of voting.—Act creating graded school district, including portions of two white and colored districts as established by board of education, valid though no new registration ordered for entire electorate of new district. *Smith v. School Trustees*, 141—143.

Presumption in favor of correctness of result of election as declared by proper officials, is final until reversed by judgment, after trial of issues brought to impeach it. *Wallace v. Salisbury*, 147—60.

ELECTIONS.

Registrar in election under general law, held for purpose of issuing bonds, need not be a freeholder, and at most is only an irregularity, and in absence of evidence of substantial harm on account of it, this should not affect the result. *Hendersonville v. Jordan*, 150—38.

An election will not be disturbed because of illegal votes received or legal votes tendered and refused, unless that number be such that the connection would show a majority for contesting party. *Ibid*, 150—38.

Presumption is in favor of regularity of conduct of authorities in ordering election. *Thrash v. Coms.*, 150—694.

Bond issue for public improvements is not void because there were more than one kind of improvement to be done, but one ballot, and one ballot box. *Smith v. Belhaven*, 150—158.

Time of holding.—Legislature can prescribe such terms as it thinks proper as pre-requisite to ordering election. *Pace v. Raleigh*, 140—65.

When irregularities in holding election and recording result will not vitiate election. *Hyatt v. DeHart*, 140—270.

Permanent roll of voters.—Voters whose names are on permanent roll not required to have educational qualification. *Clark v. Statesville*, 139—490.

Place of holding.—The place for holding election under general law, should be fixed by governing authorities of town, and while these places are, as a rule, of the substance and should be fully advertised, fixing the town hall as place for holding election would be sufficient. *Hendersonville v. Jordan*, 150—38.

Qualified voters.—Qualifications for signers of petition asking for election. *Pace v. Raleigh*, 140—65.

Voters whose names are on permanent roll not required to have educational qualification. *Clark v. Statesville*, 139—490.

Voter registered on permanent roll provided by Constitution, must

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register anew to be a qualified voter. *Ibid.*, 139—490.

Suffrage amendment of 1900 fixed new qualification for voters, and matter as to registration is in wisdom of legislature and it may leave it to local authorities to order new registration if they deem it proper. *Cox v. Coms.*, 146—586.

Art. VI, sec. 4 of constitution, depriving one of right to vote unless he has paid his poll tax for previous year, refers to poll tax prescribed by Art. V, sec. 1, and is in no way affected by any increase of taxation imposed on special tax districts. *Perry v. Coms.*, 148—528.

Citizens of this State do not forfeit their right to vote under our constitution because of imprisonment for violations of penal laws of other states. *In re Ebbs*, 150—51.

Registration book.—That registration books were kept open twenty days preceding election upon bond issue, instead of ten days, does not vitiate bonds under facts here. *Cottrell v. Lenoir*, 148—138.

ELECTRIC COMPANIES.

Rights of.—Where plaintiff's charter (ch. 236, laws 1897) gave it five years in which to begin business; and ch. 179, private laws 1907, struck out this provision and inserted "within three years from and after April 1, 1907," and re-enacted the former statute; and where general public policy of State was declared in ch. 74, laws 1907, depriving electric companies of right to condemn waterpower, the re-enacting statute would not exempt plaintiff from public policy above stated. *Power Co. v. Whitney*, 150—33.

EMIGRANT AGENT.

Officer of foreign corporation coming here to hire hands for employment by himself, not emigrant agent. *Lane v. Coms.*, 139—443.

EMINENT DOMAIN.

Generally.—What is public way, always one of law. *Cozard v. Hardwood Co.*, 139—283.

EMINENT DOMAIN.

Statute authorizing timber owners to condemn rights of way for private tramways, unconstitutional. *Ibid.*, 139—283.

Town commissioners in exercise of delegated powers, may enter upon and open up land appropriated for public street without awaiting payment of damages. *S. v. Jones*, 139—613.

Cartways are regarded as quasi-public roads, and condemnation of private property for such use has been sustained. *Cook v. Vickers*, 141—101.

It is sufficient in condemnation proceedings if facts alleged plainly show that petitioner has been unable to acquire title, and why. *Durham v. Riggsbee*, 141—128.

Advisability of widening street is in discretion of aldermen and neither property owners nor courts can interfere. *Ibid.*, 141—128.

In condemnation proceedings, allegation "that petitioner has been unable to acquire title," necessary, but not an issuable fact for jury. *Ibid.*, 141—130.

Property appropriated to public use may be appropriated to another public use. But where second appropriation is inconsistent with first, power can only be exercised by reason of legislative authority given in express terms or by necessary implication. *Ry. v. R. R.*, 142—425.

In condemnation, everything necessary and incident to the original making and subsequently operating railroad must be intended to have passed as against the owner of the condemned land. *Parks v. R. R.*, 143—295.

Appeal from order of clerk appointing commissioners in condemnation proceedings, under Rev., 2580, is premature, and no appeal lies from order of judge remanding to clerk. *R. R. v. Bailey*, 143—380.

When private act provides for laying out cartway by commissioners, upon "sufficient reason" shown, question is for jury. *Cook v. Vickers*, 144—312.

EMINENT DOMAIN.

When equitable relief against a forfeiture under a time limit in a conveyance of lands for railroad use can not be had, defendant is confined to condemnation proceedings. *McDowell v. Ry.*, 144—722.

Damages.—Appeal to superior court from award of damages by jury for lands condemned for watershed, demurrer for that lands were not sufficiently described, overruled. *Asheville v. Weaver*, 148—58.

Proceeding for condemnation is a special proceeding and not a civil action. *R. R. v. R. R.*, 148—70.

In petition for condemnation of right of way, necessary to allege effort to acquire title and reason of failure. *Ibid.*, 148—73.

Where plaintiff's charter (ch. 236, laws 1897) gave it five years in which to begin business, and ch. 179, private laws 1907, struck out this provision and inserted "within three years from and after April 1, 1907," and re-enacted the former statute; and where general public policy of State was declared in ch. 74, laws 1907, depriving electric companies of right to condemn waterpower, the re-enacting statute would not exempt plaintiff from public policy above stated. *Lower Co. v. Whitney*, 150—33.

If tract of land taken for public use has a special value to owner, measured in money, that should be considered in estimating damages. *Brown v. Power Co.*, 140—333.

Owner is entitled to compensation for any additional burden. *Ibid.*, 140—334.

Court can help injured owner only as to compensation, not as to method of taking. *Durham v. Riggsbee*, 141—128.

Report of commissioners in condemnation, assessment of damages, exception and appeal, practice. *Ibid.*, 141—128.

In action for damage to land taken by water company, defendant may offer deed from plaintiff to another, imposing easement upon land of like kind, but less degree, in mitigation of damage. *Creighton v. Water Coms.*, 143—171.

EMINENT DOMAIN.

In proceeding by landowner under laws of 1901, ch. 50, to assess damages for land taken for highway, notice of proceeding must be given township trustees and county commissioners. In *re Wittkowsky's Land*, 143—247.

Care must be taken to avoid, by use of all proper means, all unnecessary damage to lands over which it has right of way. *Parks v. R. R.*, 143—289.

Payment of the appraisal into court is a condition precedent to a right of entry for construction purposes by a railroad. *S. v. Mallard*, 143—666.

Compensation should be actual market value of land. *Brown v. Power Co.*, 140—333.

See also *Abernathy v. R. R.*, 150—109.

Evidence of character of land and crops raised, competent. *Creighton v. Water Coms.*, 143—171.

See also *Abernathy v. R. R.*, 150—109.

Rights of landowners.—Notice to landowner of contemplated condemnation of his property by commissioners, not necessary, but he is entitled to notice when compensation is fixed. *S. v. Jones*, 139—613.

Appeal provided by Rev., 2587, from judgment of clerk in condemnation proceedings, under Rev., 2580, takes entire record up for review, and neither party is entitled to jury trial in term before report of jury has been made and confirmed. *R. R. v. R. R.*, 148—64.

Courts have authority under Rev., 2593, to make rules of procedure in condemnation proceedings, when not expressly provided. *Abernathy v. R. R.*, 150—103.

Before plaintiff can claim and recover compensation for right of way he must establish not a mere prima facie but a good title, as he would be compelled to do in a bill for specific performance. *Ibid.*, 150—104.

In action by owner for pay for land taken for public use, defendant may show that title is in a stranger to suit, without connecting itself therewith. *Ibid.*, 150—105.

EMINENT DOMAIN.

Causes for damage and trespass can not be joined in condemnation proceeding. *Ibid*, 150—107.

Endorsement.

See Negotiable Instruments, endorsement.

Entireties.

See Husband and Wife, conveyances.

Entry.

See Deeds, grants.

EQUITY.

Generally.—Where mental weakness is accompanied by undue influence, inadequacy of consideration and the like, equity will grant either affirmative or defensive relief, but weak understanding not of itself adequate ground to defeat enforcement of executory contract. *Sprinkle v. Welborn*, 140—163.

Equitable defense can not be proven unless set up in answer. *Alley v. Howell*, 141—115.

Agreement to turn mortgage into deed in case of default, finds no favor in equity. *Bunn v. Braswell*, 139—143.

Equity will set aside conveyance made under power of sale in mortgage, procured through collusion with administrator in fraud of rights of heirs, in absence of intervening rights of creditors or purchasers. *Morton v. Lbr. Co.*, 144—31.

Correction.—Equity will correct mistake of fact or law, which violates manifest intention of parties. *King v. Hobbs*, 139—173.

To correct bond for title on ground of mistake, evidence must be strong, clear and convincing. *Ibid*, 139—170.

Reformation.—Defendant bought plaintiff's land under mortgage sale, agreed to buy and sell to plaintiff with a profit, contract executed accordingly; plaintiffs have no equity to cancel or reform contract. *Yarborough v. Hughes*, 139—199.

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Equity of Redemption.

See Mortgage, equity of redemption.

ERROR.

Cured.—Error in reciting evidence is cured by failure of counsel to call it then and there to attention of court and have it corrected. *S. v. Murray*, 139—540.

See Harmless Error.

Escrow.

See Deeds, escrow.

ESTATE.

Generally.—"On or upon" when affecting quality of estate in reference to time of vesting and synonymous with "when." *Hooker v. Bryan*, 140—404.

Color of title is a paper writing which appears to pass title, but fails to do so. *Smith v. Proctor*, 139—314.

Trustee takes fee by implication when duties of trust require it, although it is in terms a life estate. *Ibid*, 139—314.

If word "heirs" appears in premises, habendum or warranty, it will be transferred to that portion of the deed which will cause same to operate as fee. *Ibid*, 139—314.

Estate of inheritance would generally pass without use of word "heirs" if such was clear intent of parties. *Ibid*, 139—314.

Prior to 1879, word "heirs" generally necessary to create fee, but not so in devises or equitable estates. *Ibid*, 139—314.

To create privity of estate, there must have existed between different disseizors some such relation as ancestor and heir, etc. *Jennings v. White*, 139—22.

Will gave to son in Mississippi privilege to return and take certain land, or remain and receive other property; estate in land here never vested where he remained in Mississippi. *Pitchford v. Limer*, 139—9.

When estate is devised to one when he is twenty-one, and in meantime property is given to pa-

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rent for legatee's benefit, interest will vest at death of testator. *Hooker v. Bryan*, 140—402.

Estate is conveyed to trustee for sole and separate use of a married woman and her heirs, and she becomes discoverer, necessity for preserving the separate estate being at an end, statute executes the use and she becomes absolute owner. *Cameron v. Hicks*, 141—21.

An alien may hold lands until his estate be divested by an office found or some other equally solemn sovereign act. *Johnston v. Lbr. Co.*, 144—717.

The word "estate" in Rev., 28, is of the greatest extension and broadest significance. It comprehends every species of property, real and personal. *Glascock v. Gray*, 148—349.

Use of the word "estate" in a will includes testator's land and is not restricted to personal property. *Powell v. Wood*, 149—238.

An estate to one, with a declaration of the use to grantor's wife and two named daughters in fee "and to survivors of them," will, nothing else appearing, vest the use of the fee in two daughters after death of wife, for, though no estate could be limited upon a fee simple, at common law, a limitation of this kind may take effect by way of shifting use. *Campbell v. Cronly*, 150—468.

Base or qualified fee.—Where timber deed gave grantee the right to enter upon lands and cut and remove timber within five years, and that land should not be cut over for timber a second time, a base or qualified fee was granted and this second clause was not repugnant. *Davis v. Frazier*, 150—452.

Conditional.—Where testatrix gave life estate to her husband, remainder to her niece provided she lived with her uncle till she became free, or married, her intention will govern and fee will vest in niece, though she was required to leave uncle's home on account

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of his insanity. *Lynch v. Melton*, 150—596.

Equitable.—In ejectment, plaintiff who has equitable interest may recover against wrongdoer. *Hinton v. Moore*, 139—43.

Interest of vendee in bond for title, not subject to sale under execution upon judgment rendered for purchase money. *McPeters v. English*, 141—491.

Survivorship.—When deed in trust creates a succession of survivorships in the use of the land, to children and grandchildren of B. and C., a deed from child of C. in lifetime of B. and C. vests in him his interest only. *Campbell v. Cronly*, 150—469.

ESTOPPEL.

Generally.—Estoppel works upon estate which deed purports to convey and binds after acquired title between parties and privies. *Weeks v. Wilkins*, 139—215.

No privy examination taken, when an estoppel. *Ibid*, 139—215.

Judgment is an estoppel as to issues raised by pleadings which could be determined in that action. *Bunker v. Bunker*, 140—18.

Plaintiff in ejectment must show good title against the world, or good against defendant by estoppel. *Campbell v. Everhart*, 139—502.

Where divorce decree entered by competent court having jurisdiction, plaintiff estopped from setting up defenses passed upon. *Bidwell v. Bidwell*, 139—402.

To derive benefit in any court from former judgment, it must be specially pleaded. *Smith v. Lbr. Co.*, 140—375.

A judicial determination of issues in one action is bar to subsequent and similar one, although form and relief sought in latter different from former. *Lbr. Co. v. Lbr. Co.*, 140—437.

Estoppel is sufficiently pleaded where all facts going to make up estoppel are set out in pleadings, though not claimed as estoppel in terms. *Alston v. Connell*, 140—485.

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One who prevents performance of condition, or makes it impossible by his own act, can not take advantage of nonperformance. *Harwood v. Shoe*, 141—161.

Where failure of grantee of deed to carry out contract of maintenance with grantor was due to act of heirs at law of grantor, they can not profit by their wrongful act, though not parties to contract. *Ibid*, 141—161.

In action to recover installments of wages, judgment obtained for second installment upon summons issued after second and third installments are due, bars action for third installment. *Smith v. Lbr. Co.*, 142—26.

Where demurrer to complaint is sustained, and an amended complaint filed and answered, judgment upon demurrer is no estoppel. *Thomasson v. R. R.*, 142—317.

Where defendant in processioning proceeding raised no issue of title, he is estopped by that judgment to deny boundary thus determined. *Davis v. Wall*, 142—450.

Where jury find that plaintiff and defendant claim under same testator, defendant estopped from questioning title of common grantor. *Steadman v. Steadman*, 143—345.

Admission by defendant in answer that title to timber passed to plaintiff, estops him from asserting right to cut it under contract previously made by him with grantor, such being a personal covenant, and not one running with the land. *Tremaigne v. Williams*, 144—114.

Judgment by default final upon complaint alleging that plaintiff was "owner in fee simple" of certain lands, and asking to recover possession, puts title to lands in issue and is an estoppel in subsequent action by same defendant against same plaintiff in action to recover the lands. *Turnage v. Joyner*, 145—81.

Plaintiff is not estopped to bring another action in superior court against same defendant upon same subject matter, where he was dismissed by magistrate for want of

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jurisdiction. *Brick v. R. R.*, 145—203.

A person may by his words or conduct be estopped as against a third person to deny that another person is his agent, and when one of two innocent persons must sustain a loss, the law will place it upon the one whose conduct, either intentionally or negligently, misleads the other. *Metzger v. Whitehurst*, 147—177.

Quitclaim deed is no estoppel upon grantee so as to preclude him from denying that he received any estate by the deed. *Bryan v. Eason*, 147—293.

Deed made by one assuming to act as trustee for benefit of grantor's wife and children, under deed in trust not executed by the wife, does not by its recitals estop the wife, when not a party thereto, from claiming title to her land embraced therein. *Featherston v. Merrimon*, 148—207.

Defendant claiming title to timber by mesne conveyance from plaintiff, is estopped to deny plaintiff's title to lands in action for damages for cutting timber of other kinds than conveyances specify. *Smith v. Lbr. Co.*, 150—41.

When a judgment expressly reserves the rights of one of the parties litigant, without prejudice, it does not estop him from further asserting his rights. *Green v. Rodman*, 150—180.

Feme covert claiming interest in lands under decree of court, can not assert her claim thereto under one clause of entire judgment and repudiate lien upon it declared by another clause. *Windley v. Swain*, 150—361.

Ceases when.—When possession is wholly restored to him who gave it, estoppel of tenancy ceases. *Campbell v. Everhart*, 139—502.

Feeding.—Where deed sufficient to convey grantor's whole interest, a one-fourth interest after acquired by grantor will enure to benefit of grantee. *Buchanan v. Herring*, 141—39.

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In pais.—Estoppel in pais, or equitable estoppel, defined. *Lbr. Co. v. Price*, 144—54.

To create estoppel in pais, defendant must know of his title; plaintiff did not know this and relied upon defendant's representations; and plaintiff must be deceived. *Ibid*, 144—56.

Plaintiff claiming inheritance of land by right of survivorship of her ancestor under terms of will can not deny fee simple title of her grantee under deed thereto made by her for value. *Walker v. Taylor*, 144—175.

Generally, the parties to a judgment are not bound by it in a subsequent controversy between themselves, unless they were adversary parties in the original action. *McCollom v. Chisholm*, 146—24.

When mortgaged land is conveyed to brother and sister, mortgage is bought in by their father, and upon foreclosure sale by commissioner, father purchases and conveys reversion to his son, he is not thereby estopped to claim title. *Sutton v. Jenkins*, 147—15.

Reciprocal conveyances of same land between plaintiff and defendant made at the instance and for the benefit of the former, without consideration, vests, but does not rest the title and does not estop defendant from claiming under a different source. *Ibid*, 147—15.

In determining ownership of land, when both parties claim title under same person, it is not competent for either, as such, to deny that such person had the title. *McCoy v. Lbr. Co.*, 149—3.

Title to property may pass, and true owner may be precluded from asserting his title as against a purchaser from one having no title, by conduct which comes within the definition of an estoppel in pais. *Supply Co. v. Machin*, 150—743.

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Generally.—Evidence should raise more than mere conjectures. *Campbell v. Everhart*, 139—502.

See also *Byrd v. Express Co.*, 139

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—276; *Crenshaw v. St. Ry. Co.*, 144—320.

Presumption that primary evidence injurious, where secondary evidence offered. *Yarborough v. Hughes*, 139—200.

Evidence that trustee made no attempt to recover possession of property, because told by life tenant not to, incompetent. *Kirkman v. Holland*, 139—185.

Only facts known to defendant at time of affidavit for warrant of attachment, to be considered upon question of whether he had probable cause. *Moore v. Bank*, 140—293.

Evidence that defendant had previously maintained sidetrack at same location without inconvenience or accident, competent. *Corporation Commission v. R. R.*, 140—239.

Equitable defense can not be proven unless set up in answer. *Alley v. Howell*, 141—115.

Competent for witness to say "I think," where he has had opportunity to note and has observed relevant facts. *Gilliland v. Board of Ed.*, 141—482.

Burden is upon insurer to show how it came in possession of policy, when it disappeared from her possession shortly prior to death of insured, and not upon beneficiary that it was obtained by fraud. *Lanier v. Ins. Co.*, 142—15.

Issue of pass to plaintiff long time after injury, describing him as "injured employee," no ratification of conductor's attempted employment. *Vassor v. R. R.*, 142—68.

Evidence that plaintiff never received notice of assessment, for failure to pay which his policy was cancelled, competent. *Duffy v. Ins. Co.*, 142—103.

In action on breach of contract, evidence that plaintiff borrowed money so that he could fulfill his contract, competent upon issue as to his ability to perform. *Ives v. R. R.*, 142—131.

Receipt of letter purporting to be signed by person is no evidence it was written by such person. *Beard v. R. R.*, 143—136.

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Where plaintiff admits receipt of certain letters from defendant, which were not produced, correct copies are shown him, defendant may ask him on cross-examination as to their contents. *Ibid*, 143—136.

In action against insane person for breach of warranty in deed, witness who is not interested in recovery is competent though he may have interest in the land. *Lemly v. Ellis*, 143—200.

Where question does not show purpose for which it is asked, and objection to it is sustained, counsel should indicate what was expected to be shown by the question. *Baker v. R. R.*, 144—40.

Evidence that plaintiff's dam had never broken until defendant placed a cross dam and ponded water on plaintiff's land, causing his dam to break three times, is more than conjectural. *Clark v. Guano Co.*, 144—74.

Kind of proof necessary in action for negligence. *Crenshaw v. St. Ry. Co.*, 144—320.

Evidence which is more than conjectural or speculative to establish fact in issue, is for jury. *Metal Co. v. R. R.*, 145—297.

When court excludes evidence, he who excepts to ruling should show what he proposes to prove and the relevancy of the evidence. *Bernhardt v. Dutton*, 146—209.

Testimony of wife of injured employee, of what she observed herself, and not what she heard her husband say, tends strongly to corroborate the medical expert that plaintiff suffered from mental disorder, and is competent. *Brown v. R. R.*, 147—138.

To recover for a willful wrong, there must be evidence tending to give it the character imputed to it as well as alleging it in the complaint.—*Bailey v. R. R.*, 149—175.

When judge excluded certain evidence, which he thereafter, at close of all evidence, offered to admit, and witnesses had not been discharged, error, if any, was cured. *Nail v. Brown*, 150—534.

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Admissions and confessions.—

Where a contract, required to be in writing, is admitted in a letter, telegram or other writing, by the person to be charged therewith, the admission must contain internal evidence of the contract or refer to some writing that does. *Winders v. Hill*, 144—618.

Plaintiff may offer as an admission a section of answer containing allegation of a distinct separate fact relevant to inquiry, though only part of entire paragraph, without introducing explanatory matter. *Sawyer v. R. R.*, 145—24.

When defendants seek to avoid plaintiff's deed for that the corporation, a co-defendant, was insolvent at time deed was executed, a judgment in a separate and distinct action, to which plaintiff was not a party, adjudging company insolvent, is no evidence thereof in this action. Admissions of president of company made therein in his own interest, are inadmissible. *Latta v. Elec. Co.*, 146—305.

Statement made by injured employee to physician, before receiving treatment, as to how injury occurred, is admissible. *Smith v. Lumber Co.*, 147—63.

Statement in complaint and answer is some evidence that line is owned by telegraph company, over which message was forwarded by it, when complaint contains distinct allegation of ownership, which answer does not deny. *Willis v. Tel. Co.*, 150—323.

Statements of others to be evidence against one, on ground of implied admission by his silent acquiescence therein, must be made on an occasion when a reply might properly be expected, and plea of testator's attorney in former criminal action for mercy because of weak-mindedness, is no evidence in action to set aside will. In re *Thorp*, 150—489.

Silence of a party as an admission of statements made in his presence, is to be received in evidence with great caution. *State v. Jackson*, 150—833.

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Silence of one present at a judicial or quasi-judicial investigation, when statements are made by a witness, is no evidence of his admission of the truth of the statements, unless he was afforded fair opportunity to speak. *Ibid*, 150—835.

Silence of one in whose presence statements are made is no evidence of his admission of the truth of the statements, when they were made under such circumstances as would not naturally call for a reply, nor ordinarily when the person silent respecting them had no present interest specially involved. *Ibid*, 150—835.

Adverse possession.—Adverse possession, sufficient evidence of. *Kirkman v. Holland*, 139—185.

Where title out of State, and possession for more than thirty years, grant presumed from State and not necessary to show connection between successive occupants. *Jennings v. White*, 139—26.

In adverse possession, plaintiff must show privity in respect to locus in quo between himself and those whose possession preceded his. *Ibid*, 139—22.

Agency.—Contract under seal, must be in name of principal and purport to be his deed. In contracts not under seal, question of agency one of intent. *Hicks v. Kenan*, 139—337.

Evidence of agency for jury. *Jackson v. Telephone Co.*, 139—347.

Court must be satisfied that agency has been shown, before what alleged agent said or did, competent. *Ibid*, 139—347.

Ambiguity.—Ambiguously worded clause in policy construed in favor of insured. *Bray v. Ins. Co.*, 139—390.

Latent ambiguity in deed may be explained by parol. *Walker v. Miller*, 139—448.

Where mortgage for purchase money of land provided that if mortgage "was not paid before my death, afterwards it is not collectible," it is competent to show by daughtsman what mortgagee meant

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by this expression, and if mortgage was not paid, notes secured thereby were not collectible. *Jones v. Norris*, 147—87.

Ancestry.—In question of race ancestry, the manner in which one is received and treated by his neighbors, is competent, and also "there was nothing said against his voting, I think he always voted, though negroes at time did not vote." *Gilliland v. Board of Education*, 141—482.

Book Entries.—Evidence that stock in corporation was not worth more than fifty cents on the dollar, entries in stock books as to its value, which witness did not make, not competent to contradict him. *Lemly v. Ellis*, 143—200.

Burden of Issue.—Party who has not burden of issue, not bound to disprove actor's case by preponderance of evidence. *Board of Education v. Makely*, 139—36.

Burden of issue never shifts. *Ibid*, 139—35.

Changed Conditions.—Error to admit evidence of changed condition of appliances or surroundings after injury complained of. *Aiken v. Mfg. Co.*, 146—328.

Evidence as to condition of machine not long before trial and 22 months after occurrence of injury, is competent, when circumstances are such that no probable change has occurred. *Blevins v. Cotton Mills*, 150—497.

See also, *Johnson v. Ry.*, 140—581.

Change of rules of.—Legislature may change the rules of evidence by making the possession of prohibited quantity of intoxicants prima facie evidence of guilty intent, but it cannot do so when effect is to deprive one of a constitutional right. *State v. Williams*, 146—626.

Character.—Plaintiff's witness on cross-examination testified to defendant's good character; on redirect whether he heard defendant had committed certain offenses, incompetent. *Coxe v. Singleton*, 139—361.

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Circumstantial.—Evidences of circumstances will support the finding of fraud, if sufficient to reasonably satisfy the mind of the judge or jury. *Tuttle v. Tuttle*, 146—489.

Collateral Attack.—Issue of letters of administration cannot be collaterally attacked in action for wrongful death. *Plemmons v. R. R.*, 140—286.

Competent.—Where complaint alleged delivery of telegram "after 8 A. M.," evidence of its subsequent delivery competent. *Alexander v. Tel. Co.*, 141—75.

In action to recover for overcharge of freight, evidence as to interstate shipments, competent. *Lumber Co. v. R. R.*, 141—172.

Competent to show that others were paying less than plaintiff for same service, under similar circumstances. *Ibid*, 141—172.

Where one clears land covered by grant, fences it, uses house, grazes cattle, and pays taxes, sufficient evidence of adverse possession. *Vanderbilt v. Johnson*, 141—370.

In action on delayed telegram, evidence that sendee would have gone had he received it, competent. *Carter v. Tel. Co.*, 141—376.

In proceeding for dower, where defense was abandonment, competent to ask plaintiff if she left husband of her own volition. *Hicks v. Hicks*, 142—231.

Competency of evidence determined by substance of witness' answer rather than form of question. *Ibid*, 142—231.

In action against administrator d. b. n. for settlement, competent to show any indebtedness due estate by former administrator or by other debtors. *Mann v. Baker*, 142—235.

Contract between independent contractor and defendant is admissible to show its relation with laborers, and need not be set up in answer. *Young v. Lumber Co.*, 147—35.

In ascertaining value of use of lumber yard caused by plaintiff's breach of contract to receive lumber, testimony of the use to which

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defendant could have put it, etc., is relevant. *Coles v. Lumber Co.*, 150—191.

Corroborative.—A., who had testified, cannot be corroborated by what B. heard another say in A's presence. *Pegram v. R. R.*, 139—303.

In action to set aside deed for fraud, evidence competent as corroborative. *Hodge v. Hudson*, 139—358.

Where witness has truly stated to a third person, of his own knowledge, a fact which he has since forgotten, testimony of such third person as to what statement was is competent. *Hart v. R. R.*, 144—91.

In action for injury to farm land by ponding water, where plaintiff testified as to value of crops before sewer was built, evidence of neighbors as to what it would probably produce now and before ponding, though they had no actual knowledge of what it had produced, is competent. *Myers v. Charlotte*, 146—247.

Where one had testified to certain facts, it is competent to show by third person that witness made a similar statement to plaintiff at time. *Whitehurst v. R. R.*, 146—590.

Evidence is competent tending to show that since injury complained of, and not before, plaintiff has suffered from nervousness, etc., as corroborative of expert evidence of a physician as to effects of bodily injury received. *Brown v. R. R.*, 147—137.

Testimony of wife of injured employee, of what she observed herself, and not what she heard her husband say, tends strongly to corroborate the medical expert that plaintiff suffered from mental disorder, and is competent. *Ibid*, 147—138.

In action by agent for commissions, evidence that agent's vendee soon after bought the property from the one to whom principal sold it, at price agreed on with the agent, is competent to show that agent's customer was "able, ready and willing." *Reams v. Wilson*, 147—306.

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Declarations made by beneficiary in life policy to others as to payment of premiums, competent as corroborative. *Matthews v. Ins. Co.*, 147—342.

In action for injury to stock in transit "original record" of conductor handling shipment is incompetent, unless he has been examined and the train record was made by him at the time. *Jones v. R. R.*, 148—452.

Custom.—Upon proof by defendant of custom of conductor in taking up tickets, testimony that this conductor had on previous occasions called on witness for ticket after its surrender to him, competent. *Parrott v. R. R.*, 140—546.

Jury may draw inference of general custom that large number of factories and mills used shields for saws in similar work. *Jones v. Tobacco Co.*, 141—202.

Evidence of plaintiff as to custom of defendant's servants to board moving train, as he was doing when injured, is competent, though he had only been employed by defendant a month. *Daniel v. R. R.*, 145—51.

Evidence that wheels were boxed in one other mill, does not show usual custom. *Sibbert v. Cotton Mills*, 145—311.

Declarations.—Unauthorized declarations of husband of feme plaintiff, who has no interest in land in controversy, not evidence. *Daugherty v. Taylor*, 140—446.

In action to establish lost deed, evidence of third person, under whom plaintiff does not claim, that he had no interest in property, incompetent. *Jones v. Ballou*, 139—526.

Where mortgage debt not shown, declaration of one that she owned debt, not shown to have title, incompetent. *Hodge v. Hudson*, 139—358.

Declarations of third person to defendant, not in presence of plaintiff, incompetent. *Joyner v. Early*, 139—49.

Whether or not language used in connection with sale of personal property constitutes a warranty,

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jury may consider testimony in light of language used, spirit in which parties met, etc. *Beasley v. Surles*, 140—605.

Evidence of conduct and declarations of one holding title under parol trust, before and after sale, and manner of dealing with property, competent. *Davis v. Kerr*, 141—11.

Testimony of one who heard plaintiff's father, just before he died, express his desire to see plaintiff before he died, competent on question of damages for delayed telegram. *Whitten v. Tel. Co.*, 141—361.

In action on breach of contract, declarations of defendant's president, in course of employment, specially deputed to make contract, competent. *Ives v. R. R.*, 142—131.

Declarations are admissible as an entirety. *Smith v. Moore*, 142—278.

Declarations of the testator made after the date of an alleged revocation written on the margin of a will, tending to prove that he did not write or execute the alleged revocation, were competent. In *re Shelton's Will*, 143—218.

Declarations of testator may not be received to explain, change or add to a written will, nor can it be revoked by parol. *Ibid*, 143—218.

While under some circumstances the declarations of testator are competent upon the question of factum of the will, they are not competent as to interpretation of contents of will. *Ibid*, 143—222.

Declarations of testatrix competent to aid jury in determining whether mutilation of will had been made by her or some other person. *Ibid*, 143—225.

Upon issue of *devisavit vel non*, declarations of testator regarding execution of will showing state of his mind, made at time or so near as to be part of *res gestae*, competent. *Linebarger v. Linebarger*, 143—229.

Upon issue of *devisavit vel non*, declarations of testator regarding execution of will, showing undue influence, made prior to its execution, competent. *Ibid*, 143—229.

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Declarations of legatee regarding his own conduct, for his own benefit, not competent against other legatees. *Ibid*, 143—229.

Declarations of testator, made prior to execution of will, coupled with those made by one devisee, alleged to have exerted undue influence over testator, competent for jury upon issue thus presented. *Ibid*, 143—229.

In ejectment, declarations of defendant's grantor while in possession, that she held under will of her father, competent as characterizing her possession. *Steadman v. Steadman*, 143—346.

Declaration of injured party made post litem motam, offered in evidence through medium of another witness, is generally inadmissible. *Brown v. R. R.*, 147—137.

Declarations of section master manifesting some impatience in spending night guarding mutilated body, while waiting for coroner, were incompetent. *Kyles v. R. R.*, 147—406.

Declarations made by insolvent husband prior to payment of debt to wife, as to how indebtedness arose, are competent, but not those afterwards. *Parker v. Fenwick*, 147—530.

When in locating corner, plaintiff was asked on cross-examination, for purpose of quasi-admission, if B., one under whom he claimed, and now dead, was present at time of certain survey and negated by answer, incompetent on redirect for witness to state that B. said that was true corner, being declaration in interest. *Brooks v. Shook*, 147—630.

Declarations of boat hand, made after drowning of passenger, are incompetent for proving dangerous condition of bateau. But defendant having examined him as its witness as to condition of bateau, it was competent to impeach or contradict his evidence upon that point by his declarations to another. *Pate v. Steamboat Co.*, 148—573.

Where two persons are engaged in furtherance of common design

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to defraud, declarations of each relating to the enterprise are evidence against the other, though made in latter's absence. *Henderson Co. v. Polk*, 149—107.

Declarations made by party and testified to on direct examination by a witness, not objected to at time, and gone fully into on cross-examination, cannot be considered on appeal. *Laney v. Hutton*, 149—266.

Declarations made by beneficiary of policy, as to statements by deceased of manner in which he had been killed, and not denied by him, were incompetent. *Hill v. Ins. Co.*, 150—3.

Testimony of agent as to what he did, as agent, is competent. *Hill v. Bean*, 150—437.

Declarations Against Interest.—Declaration of deceased person, against interest, ante litem motam, competent. *Hill v. Dalton*, 140—9.

Declaration against interest made by one person in possession in disparagement of his title, competent against defendant who claims under him. *Norcum v. Savage*, 140—472.

Evidence of common reputation of private boundary should be remote and always ante litem motam. *Bland v. Beasley*, 140—628.

Declaration of disinterested person, now dead, made ante litem motam, that an oak was the corner of tract in question, competent. *Bullard v. Hollingsworth*, 140—634.

On issue of devisavit vel non, declarations made by wife of testator at time of preparation of will, not in presence of testator or anyone connected with will or its execution, incompetent. *In re Murray's Will*, 141—588.

In action to set aside deed for fraud, because deed was represented to be a will, declarations of life-tenant in possession, now dead, made ante litem motam, that she had made a deed, the consideration, etc., is competent. *Smith v. Moore*, 142—277.

Declarations of one, verbal or written, as to relevant matters, competent in certain cases, even

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between third parties. *Ibid*, 142—278.

Declarations of one as to beginning, made long ago, who is now dead, lived half a mile from land and disinterested, are competent. *Broadwell v. Morgan*, 142—475.

Contents of letter written by one in possession, acknowledging plaintiff's title and in disparagement of her own, are competent for that purpose. *Hill v. Bean*, 150—437.

Unauthorized statement made by attorney at sale that his client claimed no interest in property being sold, incompetent as against client. *Supply Co. v. Machin*, 150—745.

To establish disputed corner, deed from deceased offered as a declaration tending to establish it, must have come from a disinterested person, made ante litem motam, by a declarant who is now dead. *Lumber Co. v. Branch*, 150—241.

Deeds, Grants and Patents.—Grants and patents issued by the sovereign are proven by the seal and entitled to enrollment. *Broadwell v. Morgan*, 142—475.

Recital in body of grant, as recorded, of affixing of seal is sufficient, though no imitation of Great Seal is copied of record. *Ibid*, 142—475.

Registered deeds can be put in evidence, when otherwise competent, though registered during trial. *Johnston v. Lumber Co.*, 144—717.

Defective Deeds.—Registration of deed upon unauthorized probate is invalid and cannot be introduced in evidence. *Allen v. Burch*, 142—525.

Where execution of deed not properly proven, because of defective probate, and proper probate since had, deed competent in new action. *Ibid*, 142—525.

Where testator died, and probate of will in 1857 was defective, and upon subsequent probate in 1906, under Rev. 3127, and duly recorded, properly admitted as evidence. *Steadman v. Steadman*, 143—345.

Demonstrative.—Where servant, by lack of insufficient tools is in-

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jured, he may explain to jury the use of the missing tool and what he would have done with it had it been furnished. *Shaw v. Mfg. Co.*, 146—240.

Statement of a physical fact peculiarly in knowledge of witness of a matter which he saw with his own eyes and to which his attention was acutely drawn, is competent. *Britt v. R. R.*, 148—40.

Evidence of common observers of results of their observations made at time in regard to common appearances, facts and conditions which cannot be reproduced and made palpable to jury, is competent. *Ibid*, 148—41.

Divorce.—Evidence sufficient in divorce. *Vandiford v. Humparey*, 139—65.

To entitle wife to divorce from husband for fornication and adultery, more than one act must be shown; the misconduct must be habitual. *Prendergast v. Prendergast*, 146—226.

Ejectment.—Plaintiff in ejectment makes out prima facie title, when. *Campbell v. Everhart*, 139—502.

In ejectment, it may be shown that lands are not vacated. *Board of Education v. Makely*, 139—37.

Where one claims swamp lands, and another claims under special grant, donee must show that his grant is for land within particular description. *Ibid*, 139—37.

Expert.—Evidence of expert in equipment of trains that a light engine should not be sent out without a conductor, competent. *Stewart v. R. R.*, 141—254.

Expert witness may testify to pertinent facts at issue in case, coming under his own observation, and to such expert opinion thereon as is proper and within his peculiar knowledge and training. *Horne v. Power Co.*, 144—375.

It is competent for a physician, admitted to be an expert, to state to what he attributes an injury, from the facts in evidence, if jury should find them to be as testified to. *Parrish v. R. R.*, 146—127.

Extraneous.—Deed conveying

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legal estate without word "heirs," conveys fee if it contains conclusive, intrinsic evidence that fee was intended and word "heirs" omitted by mistake. *Smith v. Proctor*, 139—314.

Financial Condition.—Written statement of financial condition, made by administrator to sureties prior to execution of bond, showing solvency, with docketed judgments in his favor and other evidence of extent and value of estate, competent for jury. *Moseley v. Johnson*, 144—258.

Where one states to mercantile agency that he is a member of a firm, and subsequently notifies its travelling agent that his previous letter of information was sent through mistake, he is not liable for credit advanced upon strength of letter three months later. *Drewry v. McDougall*, 145—285.

Fires.—See Railroads, fires.

Property alleged to have been burned by emission of sparks from engine, competent to show that same engine shortly before or after the fire emitted sparks. *Johnson v. Ry. Co.*, 140—581.

That engine had car of burning hulls day after burning of plaintiff's factory, irrelevant as tending to prove fact in issue. *Ibid*, 140—581.

Evidence that right of way was foul and discovered to be on fire thirty minutes after train passed, sufficient for jury. *Williams v. R. R.*, 140—623.

In action for negligent burning, testimony that "the whistle he knew as Capt. Taylor's," together with other evidence, sufficient for jury as to identity of the defective engine. *Whitehurst v. R. R.*, 146—590.

Fraud.—Where one relies upon his legal title only, without averment of undue influence or fraud in treaty, evidence of such properly excluded, but evidence of mental capacity of plaintiff's ancestor to execute deed under which defendant claimed, and evidence of fraud in factum, competent. *Alley v. Howell*, 141—113.

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Fraud and undue influence are foreign to allegation of legal title and cannot be put in evidence unless defendant has notice by appropriate allegations in complaint. *Ibid*, 141—114.

Mortgagee need not be at his sale, but this and any other relevant fact which tends to show true situation, competent for jury upon question of fraud. *Davis v. Keen*, 142—497.

Upon issue of *devisavit vel non*, age of testator, mental and physical condition, competent. *Linebarger v. Linebarger*, 143—229.

Guaranty.—Facts not sufficient to constitute guaranty. *Hughes v. Warehouse Co.*, 139—158.

Habits.—When an account rendered is not objected to in a reasonable time, failure to object will be regarded as an admission of its correctness by the party charged, and evidence of plaintiff's habit of drinking liquor excessively was competent, where defendant denied his competency to transact business or to keep the account correctly. *Davis v. Stephenson*, 149—116.

Handwriting.—Signature of endorser, where endorsement required to vest legal title, must be proved. *Tyson v. Joyner*, 139—69.

Witness may testify to any fact which does not include a personal transaction or communication with decedent. *Davidson v. Barden*, 139—1.

Plaintiff may prove handwriting of intestate, but not that he saw him sign paper sued on. *Ibid*, 139—1.

Evidence of witness as handwriting expert, without qualifying himself, incompetent. *Bivings v. Gosnell*, 141—341.

In action upon note, alleged by defendant's administrator to be a forgery, where non-expert has testified that he noticed a difference in signature to note and certain papers in genuine handwriting, competent for him to show the difference in writing to jury. *Martin v. Knight*, 147—579.

Evidence, hearsay.—In action to establish lost deed, evidence of

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third person, under whom plaintiff does not claim, that he had no interest in property, incompetent. *Jones v. Ballou*, 139—526.

A., who had testified, cannot be corroborated by what B. heard another say in A.'s presence. *Pegram v. R. R.*, 139—303.

To establish common reputation of boundary, error to permit witness to testify that he knew the line "from what people said," where only person he ever heard say so was alive and witness in the case. *Bland v. Beasley*, 140—628.

When one offers to read the testimony given in a former trial by a witness who is now sick and absent, he should show how long the witness had been sick, character of the sickness, and whether it was practicable to have a deposition taken. *Smith v. Moore*, 149—190.

Hypothetical Questions.—While hypothetical questions involving negligence and contributory negligence conclude with a direction to the jury to answer the first issue "Yes," and the second issue "No," the most satisfactory way is to direct the instruction to each issue separately. *Overcash v. Electric Co.*, 144—586.

Impeaching.—Competent to show that defendant's witness had made contradictory statements, as impeaching but not as substantive evidence. *Johnson v. Ry. Co.*, 140—582.

Where one has set up a deed as foundation of his title, and, without amendment of his complaint, when he finds it does not serve his purpose, he cannot attack it by parol evidence. *Webb v. Borden*, 145—194.

Incompetent.—In action for negligent killing, inventory of intestate's personal property inadmissible to show earning capacity. *Cooper v. R. R.*, 140—209.

Testimony of witness interested in action, of personal transaction with deceased, from whom defendants claim, incompetent against them. *Campbell v. Everhart*, 139—520.

Where evidence of transaction incompetent under Code Sec. 509, it

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was improper for defendant's counsel to comment on failure of plaintiff to testify on question of demand. *Davis v. Evans*, 139—440.

Transaction with deceased, when incompetent to testify. *Ibid*, 139—440.

In action for cancellation of policy, whether plaintiff subsequently secured other insurance in lieu of that abandoned, incompetent. *Green v. Ins. Co.*, 139—309.

Plaintiff's witness on cross-examination testified to defendant's good character; on redirect whether he heard defendant had committed certain offenses, incompetent. *Coxe v. Singleton*, 139—361.

Where mortgage debt not shown, declaration of one that she owned debt, not shown to have title, incompetent. *Hodge v. Hudson*, 129—358.

New trial not allowed where incompetent evidence withdrawn from jury and language of judge so clear in withdrawing it, this court is satisfied jury could not have been misled. *Parrott v. R. R.*, 140—546.

In proceeding for partition, evidence tending to show mutual mistake in deed under which defendant claimed, incompetent. *Buchanan v. Herring*, 141—39.

Entire verdict vitiated where it is indivisible and cannot be ascertained to what extent incompetent evidence influenced jury. *Dunn v. Currie*, 141—123.

When it is not shown that marriage of slaves has come within provisions of act of March, 1866, declarations of woman claiming man as her husband and general reputation thereof, are incompetent as evidence of lawful marriage to legalize issue born of them. *Nelson v. Hunter*, 144—763.

Insufficient.—"No evidence to go to jury," what is meant. *Campbell v. Everhart*, 139—502.

Evidence should raise more than mere conjecture. *Ibid*, 139—502. See also *Kearns v. R. R.*, 139—472.

Question which assumes the point in controversy, excluded. *Nelson v. Hunter*, 140—600.

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Evidence insufficient in action for damages. *Kearns v. R. R.*, 139—470.

Judicial Notice.—Reports of Corporation Commission are matters of public record, of which courts will take judicial notice. *Staton v. R. R.*, 144—135.

Court takes judicial notice of prominent towns and county seats in this State, business centers in other States and their accessibility by railway. *Furn. Co. v. Express Co.*, 144—639.

Courts of this State cannot take judicial notice of private statutes of another State. *Ice Co. v. Ry.*, 144—732.

Judicial notice is not taken of statutes of another State. They must be pleaded and proven. *Hall v. R. R.*, 146—351.

Court takes judicial notice of location of lines of railroad in counties. *McCullen v. R. R.*, 146—569.

Courts take judicial notice of boundary lines of counties, locations of cities within its jurisdiction, and prominent water courses. *State v. R. R.*, 141—846.

Letters.—Letters addressed to a third party, stating and affirming a contract, may be used against writer as a memorandum of it. *Nicholson v. Dover*, 145—19.

Where entire contract guaranteeing payment of another's debt is by letter, evidence of what was intended by letter is incompetent. *Mudge v. Varner*, 146—149.

When a letter or telegram is received in due course of mail, purporting to be in response to a letter or telegram previously sent by the receiver, it is presumptively genuine and admissible. *Edwards v. Erwin*, 148—432.

When of a series of telegrams one is admitted in evidence as received in reply to those sent by party offering them, and it does not appear to have any connection with the others and has no bearing upon the facts at issue, it is harmless error. *Ibid.*, 148—433.

When the contents of a letter came in question, and the writer

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kept no copy of it, he might testify as to its contents, after serving notice upon opposite party to produce original, which had not been done. *Rheinstein v. McDougall*, 149—254.

Contents of letter written by one in possession, acknowledging plaintiff's title and in disparagement of her own, are competent for that purpose. *Hill v. Bean*, 150—437.

Lost Documents.—Where certain papers in proceedings have been lost, competent to prove their contents by parol. *Fain v. Gaddis*, 144—765.

Malice.—Where facts are laid out before defendant's counsel and attachment sued out under his advice, evidence sufficient to rebut malice. *R. R. v. Hardware Co.*, 143—55.

Maps.—Map made by surveyor appointed in processioning proceeding to support petitioner's contention as to true line, and evidence corroborating it, should be submitted to jury. *Green v. Williams*, 144—60.

Survey made to aid city engineer in his testimony as to locus in quo, competent as corroborating him. *Land Co. v. Lang*, 146—313.

Maps, diagrams, models and photographs are competent in civil and criminal actions when used to enable witness to explain his testimony and enabling jury to understand it, but not as substantive evidence. *Britt v. R. R.*, 148—39. See also *State v. Harrison*, 145—411.

Except when map or model, used by witness to explain his testimony, is agreed upon as correct, it must be taken only as a part of testimony of the witness, for what it is worth. *Ibid.*, 148—39.

Map showing location of place where decedent was killed, made 18 months afterwards, upon statement of one who was not a witness, was properly excluded. *Strickland v. R. R.*, 150—7.

A sale of lots in accordance and recognition of a map or plat in which streets are laid out constitutes a dedication of the streets to the use of the purchasers and the

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public. *Bailliere v. Shingle Co.*, 150—637.

Mistake.—To correct bond for title on ground of mistake, evidence must be strong, clear and convincing. *King v. Hobbs*, 139—170.

In action to recover over-charge for mistake in deed, assurance of commissioner as to quantity, personal knowledge purchaser has of land and extent of deficit, questions for jury. *Peacock v. Barnes*, 142—215.

Mortuary tables.—Mortuary tables only evidential and not conclusive of one's expectancy. *Sledge v. Lumber Co.*, 140—461.

In action for negligently causing death, court should not permit jury to consider "annuity act," for purpose of ascertaining present value of intestate's life. *Poe v. R. R.*, 141—525.

"Income" embraces only net profits arising from a fund after deducting all necessary expenses and charges. "Annuity" is fixed amount directed to be paid absolutely and without contingency. *Ibid.*, 141—526.

Newspaper.—Value of securities sold by administrator as evidenced by sale is not conclusive; but market quotations at different times, testimony of witnesses and market quotations appearing in daily papers published in State of corporate securities wherein they had a market value, competent upon question of value. *Moseley v. Johnson*, 144—258.

Newly Discovered.—When petition to rehear is docketed the case is again in Supreme Court for argument, and motion for new trial for newly discovered evidence can be made here; but mere application to rehear, not ordered docketed by justices to whom it is presented, does not put case in Supreme Court. *Smith v. Moore*, 150—159. See also Appeal, newly discovered evidence.

Nonsuit.—Evidence viewed most favorably for plaintiff on motion to nonsuit. *Hicks v. Kenan*, 139—346.

See also: *Biles v. R. R.*, 139—528; *Milhisier v. Leatherwood*, 140—

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238; *Gerock v. Tel. Co.*, 142—22; *Biles v. R. R.*, 143—78; *Britt v. R. R.*, 144—243; *Cotton v. R. R.*, 149—229; *Smith v. Hartsell*, 150—75; *Settle v. R. R.*, 150—644.

Opinion.—Upon question whether one had sufficient mental capacity at time he signed release, evidence of a witness that in her opinion he did not, is not so obscure as to constitute reversible error. *Beard v. R. R.*, 143—136.

Expressions of commendation or opinion or extravagant statements as to value or prospects do not, as a rule, constitute legal fraud. *Frey v. Lbr. Co.*, 144—762.

Representations which are matters of opinion as to quantity of timber covered by contract to sell, given and received as such, when parties were at arm's length, cannot be set up as counterclaim for damage in action upon notes given for purchase price. *Ibid.*, 144—759.

Where witness had opportunity to know relevant facts himself, and did observe and note them, the evidence is but the statement of a fact though expressed in the form of an opinion. *Taylor v. Security Co.*, 145—389.

Knowledge of a fact as evidence, distinguished from opinion evidence. *Ibid.*, 145—391.

Opinion of a witness as to value of land before telephone poles were placed, and its decreased value since, is competent. *Wade v. Tel. Co.*, 147—223.

Opinion of plaintiff as to rate at which train was moving when he attempted to get on, is competent. *Whitfield v. R. R.*, 147—238.

Competent for one to testify that rafting gear furnished was not sufficient, it being the result of knowledge and not an opinion. *Ives v. Lbr. Co.*, 147—308.

Servant who is injured from lack of safety appliance in general use, may explain that he could not have been hurt if he had the appliance, and whether he would have used it had it been furnished. *Bennett v. Mfg. Co.*, 147—621.

Statement of a physical fact pecu-

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liarly in knowledge of witness of a matter which he saw with his own eyes and to which his attention was acutely drawn, is competent. *Britt v. R. R.*, 148—40.

Evidence of common observers of results of their observations made at time in regard to common appearances, facts and conditions which cannot be reproduced and made palpable to jury, is competent. *Ibid*, 148—41.

In action for ponding water, competent for plaintiff to testify how much crop would have been made that year, if proper drainage had been provided, this being the witness' impression from conditions actually observed and noted by him. *Davenport v. R. R.*, 148—294.

In action upon note given for tire setter, sold under warranty, competent for witnesses who have used and had actual experience with same kind of appliance, to state that it would not do the work for which it was sold. *Tire Setter Co. v. Whitehurst*, 148—448.

Courts are disposed to admit opinion evidence when witnesses have had personal observation of facts and conditions, and from their practical training and experience are in a condition to aid the jury to a correct conclusion. *Wilkinson v. Dunbar*, 149—28.

Opinion evidence, in strictness non-expert, may be received as to condition of one's mind, when relevant to inquiry, such opinion must come from association or personal observation of such witness, and not from facts and circumstances detailed to him by others. *Myatt v. Myatt*, 149—140.

When witness has had more or less opportunity to form an opinion as to one's mental condition, he may express his opinion, its value being dependent upon the opportunity of the witnesses to form it. *State v. Banner*, 149—524.

Parol.—When plaintiff purchased for value, parol evidence that his grantor deeded land in controversy to another, inadmissible. *Hinton v. Moore*, 139—43.

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Where deed from trustee refers to deed of trust, and gives further description, parol evidence admissible in aid of description. *Ibid*, 139—43.

Parol evidence competent to show consideration of note given for purchase money of land. *McPeters v. English*, 141—491.

Rule that written contract may not be contradicted or added to by parol, applies only where entire contract is written. *Evans v. Freeman*, 142—61.

Competent to prove by parol that note was given for purchase money of land, and not necessary that it describe land. *Davis v. Evans*, 142—465.

"Beginning at a pine on East side of Gum Swamp," is sufficiently definite to admit parol evidence of description in grant or deed. *Broadwell v. Morgan*, 142—475.

Competent to show by oral evidence collateral agreement as to how an instrument for payment of money should in fact be paid, though instrument is in writing and promise it contains is to pay in so many dollars. *Typewriter Co. v. Hardware Co.*, 143—97.

Oral evidence is not competent to vary written instrument to show that it had a meaning not expressed in it by the parties, but it is admissible in equity to correct it. *White Co. v. Carroll*, 147—334.

When note is given in pursuance of terms of written contract, evidence of contemporaneous oral agreement, made as part thereof, that note and contract were executed and given upon a condition precedent to their validity, which has not been performed, is competent. *Hughes v. Crooker*, 148—320.

If calls of deed are sufficiently definite to be located by extrinsic evidence, location cannot be changed by parol agreement, unless agreement was contemporaneous with making of deed. *Haddock v. Leary*, 148—380.

Where plaintiff in action for trespass failed to show chain of title by deed and endeavored to make

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prescriptive title by color and possession, competent to prove a line agreed upon between plaintiff and defendant's ancestor and that plaintiff did not claim any right or possession beyond it, before plaintiff's colorable title had ripened. *Ibid*, 148—381.

Where contract has printed on its face that no agreement other than stated in face of it will be recognized, if agent had authority to make the oral agreement, burden is on defendant to show it, even if such evidence were competent. *Medicine Co. v. Mizell*, 148—387.

Evidence of an oral stipulation made at time of execution of written contract, as part thereof, is incompetent, when in conflict or at variance with written part. *Ibid*, 148—383.

Where mortgage and notes recited an indebtedness of 200 bales of lint cotton, evidence of mortgagor that in event of foreclosure amount to be paid was \$400 in money, the original sale price of land, was properly excluded. *Walker v. Venters*, 148—389.

Parol evidence is never admitted if wording of written contract is clear or if evidence offered is in direct contradiction of intrinsic meaning of language of contract. *Ibid*, 148—390.

Parol evidence tending to show that conditions had arisen in a particular instance so that printed rule of employer did not apply, is not an interpretation of the rule by parol. *Meacham v. R. R.*, 149—153.

In action for specific performance, parol evidence will be heard, not to contradict or vary written contract, but to put court in possession of all facts and circumstances surrounding treaty and entering into the negotiation, that it may ascertain whether there was any element of fraud, mistake or unfair advantage taken by party seeking the equitable aid of the court. *Rudisill v. Whitener*, 149—441.

Payment.—Presumption of payment arises only between executor

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and legatee, debtor and creditor. *Outlaw v. Garner*, 139—190.

See also **Payment**.

Peculiar Knowledge.—Where means of proof are under control of one, burden is upon him to show facts. *Watson v. R. R.*, 145—239.

When a particular fact, necessary to be proved, rests particularly within the knowledge of one of the parties, upon him rests the burden of proof. *Furn. Co. v. Express Co.*, 144—645.

Proof of injury to stock in possession of carrier makes a prima facie case of negligence sufficient to carry case to jury, and after hearing defendant's evidence as to how injury occurred, it is for jury to say whether it was due to defendant's negligence. *Jones v. R. R.*, 148—452.

Personal Transaction with Decedent.—In action against executor, evidence of services "rendered," though not in so many words, to testator, incompetent. *Stocks v. Cannon*, 139—60.

Evidence of personal transaction with decedent, in favor of personal representative, competent. *Bonner v. Stotesbury*, 139—3.

Witness may testify to any "substantive and independent fact," not personal transaction with deceased. *Davidson v. Barden*, 139—1.

Testimony of plaintiff that she "gave him medicine, prepared his nourishment," etc., incompetent in action against administrator. *Ibid*, 139—1.

Transaction with deceased, when incompetent. *Davis v. Evans*, 139—440.

Where evidence of transaction incompetent under Code Sec. 590, it was improper for defendant's counsel to comment on failure of plaintiff to testify on question of demand. *Ibid*, 139—440.

Testimony of witness interested in action, of personal transaction with deceased, from whom defendants claim, incompetent against them. *Campbell v. Everhart*, 139—520.

In action for services rendered defendant's intestate, evidence as to

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what work one did, incompetent under Rev. 1631. *Dunn v. Currie*, 141—123.

In action to recover for services to decedent, plaintiff cannot testify as to contract. *Ibid*, 141—126.

Testimony of defendant's son, who resides on mortgaged land, competent as to personal transaction with decedent, in action to foreclose deed. *Bennett v. Best*, 142—168.

Whether wife left husband's home voluntarily, or by reason of what law calls compulsion, does not necessarily disqualify her under Rev. 1631. *Hicks v. Hicks*, 142—231.

In action to set aside deed for fraud, statement of attorney of grantee, he now being dead, to plaintiff upon execution of deed, incompetent. *Smith v. Moore*, 142—277.

In action by one against administrator of mother-in-law, plaintiff's daughter, a distributee, is a competent witness for her father. *Henderson v. McLain*, 146—333.

On issue of *devisavit vel non*, not competent to prove by witness, whose husband was caveator and heir at law of decedent, declaration of testator to show undue influence. *Linebarger v. Linebarger*, 143—229.

When administrator acted as confidential agent of intestate, a feeble old man, prior to his death, and claims property of intestate by purchase, he must show full and sufficient consideration; and if claimed by gift, that intestate knew what he was doing, had capacity to understand it, and no undue influence was exercised. *Moseley v. Johnson*, 144—257.

Revisal 1631 does not prohibit testimony of executor in favor of deceased legatee of his testator; and he may testify to declarations made by deceased legatee in her own favor in presence of devisor. *Medlin v. Simpson*, 144—397.

One may testify to what a witness, now deceased, testified on trial before referee. *Worth v. Wrenn*, 144—662.

Husband is interested witness in event of action, though not a party,

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when trust deed made by his deceased wife is attacked for want of his joining therein, and upon question of abandonment, his evidence that she said she would give him a horse if he would leave, and also testimony of daughter that she heard this conversation, was incompetent. *Witty v. Barham*, 147—481.

In action to set aside deed alleged to have been obtained by defendant's ancestor from plaintiff, proper for her to testify that she was sick in bed at time deed was executed. *Smith v. Moore*, 149—187.

When deceased had no interest in lands in dispute, but was simply assignee of purchaser thereof and made deed in accordance with directions given, evidence of his declarations and directions respecting manner in which deed was to have been drawn, is not excluded by Revisal Sec. 1631. *Condor v. Secrest*, 149—207.

Competent for a son of testator, who was also executor and a devisee, to state what his father did with his will, as to its execution, etc., these being independent facts and not personal transactions or communications. *In re Bowling*, 150—510.

Quantum.—Acts relied on as abandonment of contract should be clearly proved. *May v. Getty*, 140—310.

On hearing of injunction, title not required to be proved with same strictness as upon trial. *Moore v. Fowle*, 139—51.

Recital of incorrectly.—Error in reciting evidence is cured by failure of counsel to call it then and there to attention of court and have it corrected. *State v. Murray*, 139—540.

Rebuttable.—By-law of insurance company relative to notice of assessment, may be rebutted by showing non-receipt. *Sherrod v. Ins. Assn.*, 139—167.

Records.—When law does not require or authorize instrument to be recorded, copy of record is not ad-

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missible in evidence. In re Thorp, 150—491.

Original discharge papers, or records of executive committee of asylum showing discharge of testator, may be competent, but books containing copies of these papers in clerk's office, incompetent. *Ibid*, 150—491.

In action for injury to stock in transit "original record" of conductor handling shipment is incomplete, unless he has been examined and the train record was made by him at the time. *Jones v. R. R.*, 148—452.

Reputation.—In civil cases, reputation, cohabitation, declarations and conduct of parties are competent to prove that marriage relation existed between slaves. *Spaugh v. Hartman*, 150—456.

In question of race ancestry, the manner in which one is received and treated by his neighbors, is competent, and also "there was nothing said against his voting, I think he always voted, though negroes at time did not vote." *Gilliland v. Board of Ed.*, 141—482.

Res Gestae.—Declaration or act accompanying act in controversy and tending to explain it, part of *res gestae*. *Merrill v. Dudley*, 139—57.

In malicious prosecution, declaration of defendant at time he sued out warrant, competent as *res gestae* and in corroboration. *Ibid*, 139—57. See also *Stanford v. Grocery Co.*, 143—420.

What agent says while doing acts within scope of agency, admissible as *res gestae*. What he says afterwards, hearsay. *Hamrick v. Tel. Co.*, 140—151.

In ejectment, statement made by one at time of renting that he acted as agent, part of *res gestae*. *Bivings v. Gosnell*, 141—341.

When one is in possession of land, his acts and declarations qualifying and explaining such possession, are competent as part of the *res gestae*. *Smith v. Moore*, 149—189.

Statement as to cause of injury

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made by decedent to witness few minutes afterwards, was not a part of *res gestae*. *Hill v. Ins. Co.*, 150—2.

Decision of three friends called in by grantor to pass upon value of his lands to be conveyed to his children, in consideration of supporting him during his lifetime, not made in his presence, but immediately stated to him by his friends, is part of *res gestae*. *Fraley v. Fraley*, 150—505.

Silence.—Statements of others to be evidence against one, on ground of implied admission by his silent acquiescence therein, must be made on an occasion when a reply might properly be expected, and plea of testator's attorney in former criminal action for mercy because of weak-mindedness, is no evidence in action to set aside will. In re Thorp, 150—489.

Silence of a party as an admission of statements made in his presence, is to be received in evidence with great caution. *State v. Jackson*, 150—833.

Silence of one present at a judicial or quasi-judicial investigation, when statements are made by a witness, is no evidence of his admission of the truth of the statements, unless he was afforded fair opportunity to speak. *Ibid*, 150—835.

Silence of one in whose presence statements are made is no evidence of his admission of the truth of the statements, when they were made under such circumstances as would not naturally call for a reply, nor ordinarily when the person silent respecting them had no present interest specially involved. *Ibid*, 150—835.

Similar Acts.—In action for injuries to boy 12 years old, evidence of dangerous character of machine, knowledge of employer that persons at or near plaintiff's age had been injured before, and one since injury complained of, in operating similar machines and under same conditions, is competent. *Leathers v. Tobacco Co.*, 144—330.

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In action for personal injuries caused by derailment of street car, evidence that other cars had run off at same place is incompetent when it is not shown that the conditions at or near the time were the same as when plaintiff was injured. *Overcash v. Electric Co.*, 144—572.

In action for negligent burning it is competent to prove that same train had set fire to woods adjoining those of plaintiff, or near thereto, on the day before. *Whitehurst v. R. R.*, 146—591.

Evidence showing at what distance from right of way cinders from other engines had been emitted, is competent to contradict experts who offered to show that cinders would not have fallen so far from the track. *Ibid*, 146—591.

In action for negligent killing of boy near crossing in populous part of city, by a flying switch being made, evidence of frequent passing of school children, factory hands and citizens generally, competent to show conditions that should have put defendant on notice as to necessity for caution in moving cars at this point. *Vaden v. R. R.*, 150—701.

Sufficient.—Whenever the rules of evidence give to testimony the artificial weight of a presumption, the question whether such presumption is rebutted by parol evidence, introduced for the purpose, must go to the jury, unless the truth of such rebutting testimony is admitted. *Fortune v. Hunt*, 149—362.

Slight evidence, when sufficient to be submitted to jury. *State v. Walker*, 149—530.

Testimony of casual passer that he noticed rapidly approaching train 200 yards off when he crossed track, and again when it was 200 yards distant and if there was a head-light on it he could not see it, such negative testimony, standing alone, has scarcely probative force sufficient to establish any fact. *Strickland v. R. R.*, 150—7.

Any evidence which aids jury in fixing fair market value of land, and its diminution by burden put upon

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it, is competent. *Abernathy v. R. R.*, 150—109.

Testimony of witnesses to will that they were sent for and introduced to person who they never saw before, but who answered to name of testatrix, and that will was drawn and executed by such person as testatrix named in will, is sufficient upon question of identity. *Harris v. Martin*, 150—369.

Evidence of negligent injury to house by blasting, sufficient for jury. *Settle v. R. R.*, 150—644.

Evidence in this case of location of beginning point, sufficient. *Broadwell v. Morgan*, 142—475.

Surveys.—In action involving disputed boundary, testimony of surveyor that at time of making deed an actual survey was had in presence of purchaser, corners marked and lines run, is competent, and one claiming under such deed holds according to survey. *Fincannon v. Sudderth*, 144—587.

Tax Deed.—Conditions precedent to acquiring tax deed must be proven outside of the deed, and in absence of such proof purchaser acquires no title. *Warren v. Williford*, 148—479.

Tax List.—Proper to refuse list as evidence that solvent credit sued on was not listed. *Martin v. Knight*, 147—581.

Testimony on former trial.—One may testify to what a witness, now deceased, testified on trial before referee. *Worth v. Wrenn*, 144—662.

When one offers to read the testimony given in a former trial, by a witness who is now sick and absent, he should show how long the witness had been sick, the character of the sickness, and whether it was practicable to have a deposition taken. *Smith v. Moore*, 149—190.

Time Table.—Time table and train sheets used on day of injury, competent in action for death of engineer, to show movements of trains. *Stewart v. R. R.*, 141—254.

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Usury.—To prove usury, facts and circumstances, amounts paid and due and calculations made, competent. *Bennett v. Best*, 142—168.

Jury must be satisfied by clear proof that more than legal interest was intentionally and wrongfully received by creditor. *Ibid*, 142—168.

Withdrawn.—Defendant may withdraw grant during argument, which he had introduced, where neither party offered evidence locating grant. *Wall v. Wall*, 142—387.

Error in admission of evidence is cured when judge withdraws it from jury and instructs them not to consider it. *Medlin v. Simpson*, 144—397.

Examination.

See Parties, examination of.

EXCEPTION.

Generally.—Exception to admission of evidence which, if irrelevant, was harmless, is without merit. Board of Education v. *Makely*, 139—30.

Where jury finds plaintiff's intestate guilty of contributory negligence, unnecessary to consider exception to refusal of defendants prayer as to contributory negligence. *Edwards v. R. R.*, 140—49.

Where demurrer sustained, appellant should note exception and present it for review from final judgment. *Bernard v. Shemwell*, 139—447.

Approval by judge of clerk's findings of fact, conclusive; unless the exception that there is no evidence, is sustained. *Carraway v. Lassiter*, 139—145.

Exception that court failed to instruct jury upon certain phase of case, cured unless appellant had instruction to that effect. *Lyles v. Carbonating Co.*, 140—25.

Too late after trial to make exceptions to evidence or other matters occurring during trial, except

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as to charge. *Alley v. Howell*, 141—113.

Exception not set out in appellants brief, presumed to be abandoned. *Jones v. Ballou*, 139—528.

See, also, *Smith v. R. R.*, 142—21.

One's silence, when judge omits to state evidence or charge in any particular way, waives right to object if not called to his attention at time. *Davis v. Kenn*, 142—496.

Appellant not bound to except to instruction when there is no evidence to warrant it, and he has moved to dismiss. *Barrett v. Brewer*, 143—88.

Unnecessary to consider exceptions to evidence and charge which bear upon issue found in favor of appellant. *Hodgin v. R. R.*, 143—93.

Improper argument of counsel, will not constitute reversible error where not called to court's attention and no exception taken. In re *Shelton's Will*, 143—218.

Defendant's exceptions to judge's findings come too late, where upon plaintiff's appeal, judgment is reversed. *Matthews v. Fry*, 143—384.

One's exception to issues submitted is without merit, where they present every phase of the case; are such as arise upon the pleadings; are sufficient basis for judgment rendered, and he had opportunity to present every defense he had. *Kimberly v. Howland*, 143—398.

Successful party may note his exceptions and preserve them by appeal in case of reversal in supreme court, but practice is not encouraged. *Metal Co. v. R. R.*, 145—300.

If exception be to a ruling of the court on a question of evidence, testimony should be so set out that its relevancy can be seen. *Thompson v. R. R.*, 147—415.

When judge charges jury to find for defendant upon an issue, if they believe the evidence, better practice is to except to charge and appeal, than to do so upon excep-

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tions to the evidence and refusal of motion for judgment upon whole evidence. *Supply Co. v. Machin*, 150—743.

Broadside.—Entry of "defendant excepted" when void as "broad-side." *State v. Dewey*, 139—557.

"Broadside" exception for errors in charge cannot be considered. *Davis v. Wall*, 142—451.

Exception, too general, when. *Davis v. Keen*, 142—496.

Exception to charge "for errors therein contained" without specifying them, is broadside. *Streator v. Streator*, 145—339.

Exception for refusal to charge that jury should find for plaintiff upon whole evidence, is too general. *Woodbridge v. Brown*, 143—303.

Must be taken.—When judge sustains findings of fact by referee, his ruling is conclusive, except as to those findings of fact as to which there is no evidence to support them, and that ground is set out in the exception. *Foy v. Gray*, 148—436.

It is more orderly for plaintiff, whose prayer for special instructions has been refused, to note an exception instead of taking a nonsuit. *Wilson v. Fisher*, 148—538.

Errors of judge and improper language of counsel, must be excepted to at the time and upon the trial. *State v. Harrison*, 145—409.

Where there is no exception taken at the time of or appeal from an order of court appointing a receiver, the receivership continues in full force. *Talbot v. Tyson*, 147—274.

Pointed out.—Appellant should point out objections by exceptions duly noted. *Comrs. v. Erwin*, 140—193.

Exceptions noted in record and generally referred to in brief as being relied on without specifying contention of error, will be disregarded. *Snipes v. R. R.*, 144—19.

Will not lie.—Generally exception will not lie for failure to submit is-

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sues, unless requested by complaining party. *Smith v. Newberry*, 140—385.

Exception to admission against defendant of certain sections in original answer, not tenable. *Norcum v. Savage*, 140—472.

EXCUSABLE NEGLECT.

Judge should find the facts upon motion to set aside judgment for excusable mistake or neglect. *Smith v. Holmes*, 148—211.

Facts in this case show excusable neglect. *Ibid*, 148—213.

No excusable neglect shown, where defendant was notified when case would be tried, and neither he, his attorney, who had special charge of the case (who was then sick) nor his two other associates, appeared and asked for continuance, and their appeal from judgment was dismissed under Rule 17, and motion to set aside judgment was made a year later. *White v. Rees*, 150—679.

EXECUTION.

Generally.—Rev. 2842, authorizing issue of execution against principal when surety produces receipt for payment made by him, is constitutional. *Bank v. Hotel Co.*, 147—599.

Issued.—Where clerk had directed execution to issue as provided in Revisal 2842, he had no discretion to revoke his order. *Bank v. Hotel Co.*, 147—602.

Filling up an execution blank, but never actually sending it out of clerk's office, is not sufficient to prevent judgment from becoming dormant. *McKeithen v. Blue*, 149—98.

Revisal 2842, giving surety right to have execution against principal, requires at least a ten days' notice, and requisites for notice stated. *Bank v. Hotel Co.*, 147—601.

Against the person.—Execution against the person will not issue in action to recover one's part of

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partnership funds, in absence of special finding of fraud by jury. *Ledford v. Emerson*, 143—527.

There can be no imprisonment to enforce payment of a debt under final process, unless it has been found upon allegation made in complaint and corresponding issue submitted to jury that there has been fraud, and judgment entered in conformity therewith. *Ibid*, 143—527.

Where defendant, in execution against the person, was not originally liable to arrest and had been discharged upon habeas corpus, he cannot be held upon surrender by his sureties. *Ibid*, 143—527.

To entitle plaintiff to execution against the person, it is incumbent upon him to secure an affirmative answer to the issue of fraud. *Organ Co. v. Snyder*, 147—272.

Estates not liable to.—In absence of statutory provision, interest of mortgagee in personal property while mortgagor remains in possession, he also having an interest therein, is not the subject of levy by direct seizure, either under attachment or execution. *Bowen v. King*, 146—390.

Right of mortgagee in personal property in possession of mortgagor is that of creditor, and his interest could only be levied on as provided in Revisal 767. *Ibid*, 146—390.

Supplemental Proceedings.—Judge may order clerk to desist from further action in supplementary proceeding, where similar one was then pending before him. *Ledford v. Emerson*, 143—527.

Of Instruments, proved.—Plaintiff may prove handwriting of intestate, but not that he saw him sign paper sued on. *Davidson v. Bardin*, 139—1.

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Generally.—If action for damages to land accrued in lifetime of decedent, it survives to repre-

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sentative; if after his death, belongs to heir or devisee. *Mast v. Sapp*, 140—533.

Declarations of legatee regarding his own conduct, for his own benefit, not competent against other legatees. *Linebarger v. Linebarger*, 143—229.

Administrator of maker of note carrying mortgage security may buy debt and security with his personal funds and have them assigned to him. *Morton v. Lumber Co.*, 144—31.

Administrator who has purchased with his own funds a note and mortgage made by his intestate, may avail himself of security and collect from estate amount paid with interest. *Ibid*, 144—31.

Where power to sell, or to give option, is conferred upon two executors by will, power must be exercised by them jointly. *Trogon v. Williams*, 144—192.

In respect to personal estate of testator, title to which vests in executors jointly, one may sell or dispose of it, collect, compromise and release debts, cancel mortgages and do any other necessary acts necessary and proper in discharge of their duties. *Ibid*, 144—204.

When administrator acted as confidential agent of intestate, a feeble old man, prior to his death, and claims property of intestate by purchase, he must show full and sufficient consideration; and if claimed by gift, that intestate knew what he was doing, had capacity to understand it, and no undue influence was exercised. *Moseley v. Johnson*, 144—257.

That part of personal property bequeathed to legatee for life, which is perishable, in the using becomes hers absolutely. *Medlin v. Simpson*, 144—398.

Superior court has concurrent jurisdiction with probate court to settle estates and subject real estate to payment of debts. *Shober v. Wheeler*, 144—409.

Superior court has jurisdiction

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to finally determine all controversy between parties in administrations. *Oldham v. Rieger*, 145—257.

When administration is contested, collector should be appointed to institute suit for wrongful death of intestate within one year. *Gulledge v. R. R.*, 147—235.

A request of a bank "to be trustee of my children" (advised by a committee) was an appointment to administer the estate as executor, and after payment of debts to hold surplus as trustee till minors became of age. *Harper v. Harper*, 148—457.

Where will directs the sale of land and proceeds given to legatee, and prior to sale the legatee died, leaving a will, his interest passed as money to his executors under the doctrine of equitable conversion. *Haywood v. Trust Co.*, 149—221.

Accounts.—Where there are no debts or other exigencies requiring retention of funds, distributee may within the two years allowed for final account, sue for them. *Caviness v. Fidelity Co.*, 140—58.

In action against administrator d. b. n., for settlement, competent to show any indebtedness due estate by former administrator, or by other debtors. *Mann v. Baker*, 142—235.

Administrator must show that he used due diligence in collecting debts, but was unable to collect; not simply that he has accounted for what he collected. *Ibid*, 142—235.

In action for settlement, sufficient to allege breach of duty by administrator, failure to file final account and to fully settle. *Ibid*, 142—235.

Where account against plaintiff's intestate was rejected and not referred, and no action commenced within six months, not valid thereafter as counterclaim. *Morrissey v. Hill*, 142—355.

Value of securities sold by administrator as evidenced by sale is

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not conclusive, but market quotations at different times, testimony of witnesses and market quotations appearing in daily paper published in state of corporate securities wherein they had a market value, competent upon question of value. *Moseley v. Johnson*, 144—258.

In absence of any impeachment, duly verified account of administrator is to be treated as correct. *Rich v. Morisey*, 149—49.

Ademption of Legacy.—Where lands are devised by their name to plaintiff, which was claimed by a third party under a contract to convey, suit was brought on contract and successfully defended, and after testator's death action terminated against his executor, purchase money was paid, held, there was no ademption of the devise. *Rue v. Connell*, 148—305.

Where testator bequeathed certain notes specifically described, and then changed them by renewal into another form, securing same debt, legatee was entitled to new securities. *Ibid*, 148—305.

When one gave part of his land to a brother, by will, and subsequently deeded same land to a son, who conveyed to defendant, it cannot be enjoined from cutting timber, for title under deed vested before that under will. *Harris v. Lumber Co.*, 147—633.

Advancements.—While doctrine of advancements strictly arises in cases of intestacy. It is frequently necessary to construe equivalent terms expressed in will. *Dodson v. Fulk*, 147—532.

Where will provides that plaintiff shall account for \$500, before she can share in distribution of estate, she cannot show that in fact she received more or less than that sum or that she received nothing at all. *Ibid*, 147—533.

Bonds.—Surety upon administrator's bond, called upon to pay devastavit of principal, subrogated to rights of creditor. *Caviness v. Fidelity Co.*, 140—58.

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Where administrator is distributee, he and his bond liable for excess if he pays out or retains more than due him. *Caviness v. Fidelity Co.*, 140—58.

Written statement of financial condition, made by administrator to sureties prior to execution of bond, showing solvency, with docketed judgments in his favor, and other evidence of extent and value of estate, competent for jury. *Moseley v. Johnson*, 144—258.

Liability of surety upon administrator's bond for his individual debt to intestate, incurred prior to his death, depends upon solvency of administrator at time of qualification. He must show insolvency and total inability to pay, to avoid official liability. *Ibid.*, 144—258.

Interest cannot be charged sureties on penalty of administrator's bond. *Ibid.*, 144—274.

Counsel.—Personal representative may employ attorney whenever necessary to protect estate, or manage it properly. *Kelley v. Odum*, 139—278.

Executor is always personally liable to counsel for fee. *Ibid.*, 139—278.

Administrator not entitled to credit in account for attorneys fees paid in improper litigation, or in consequence of his neglect or improper conduct. *Ibid.*, 139—278.

Death by wrongful act.—In action by administrator for wrongful death of intestate, the one-year clause in Revisal, section 59, is not a statute of limitation, but a condition annexed to the cause of action, and plaintiff must prove that he has commenced action within that time. *Gulledge v. R. R.*, 147—234.

It is no excuse for plaintiff not bringing action under Revisal, section 59, within one year, to show that there was a controversy over administration, as collector should have been appointed for purpose of bringing suit. *Ibid.*, 147—234.

Where suit by foreign administrator for death of his intestate, is

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dismissed in supreme court, he should not be permitted to join in original action, by filing an amended complaint, after his qualification here, so as to have action brought within a year for wrongful death. *Hall v. R. R.*, 149—110.

In an action for wrongful killing of plaintiff's intestate, the words of the statute "to be brought within one year" is a condition annexed to the cause of action, and not as a statute of limitation which must be pleaded, and before a prima facie case can be made out evidence tending to prove that action was commenced within one year after death must be offered. *Gulledge v. R. R.*, 147—235.

When administration is contested, collector should be appointed to institute suit for wrongful death of intestate within one year. *Ibid.*, 147—235.

Debts barred.—Heirs-at-law can plead statute of limitations against administrator seeking to subject realty as fully as he could have pleaded it against a creditor. *Matthews v. Peterson*, 150—136.

Where administration was had more than ten years after death of intestate, but before Revisal went into effect, section 5454 does not apply. *Ibid.*, 150—136.

Devastavit.—One who receives money from administrator knowing its wrongful appropriation, may be compelled to answer amount. *Caviness v. Fidelity Co.*, 140—59.

Distribution.—A vested right of action has the character of property as a part of intestate's estate, and for purpose of devolution and transfer, right of claimant should be fixed as of time when intestate died. *Neill v. Wilson*, 146—245.

Where wife was entitled as distributee to fund in hands of another and she died before its collection, and thereafter her husband, who had qualified as her administrator, became non compos, fund belonged to husband's guardian. *Ibid.*, 146—245.

Protection of fund arising from negligent death of another, from

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claims of creditors, applies to creditor's of intestate's estate, and not that of distributee. *Ibid*, 146—245.

Foreign.—Deed made by foreign executor to purchasers at sale under power of sale in mortgage, is an execution of contract in mortgage, and subsequent probate of will in county where land lies relates back to time of and validates deed, if rights of third persons do not intervene. *Scott v. Lbr. Co.*, 144—44.

Non-resident administrator cannot sue in courts of this state. Original letters should be taken out here. *Hall v. R. R.*, 146—346.

Where suit by foreign administrator for death of his intestate, is dismissed in supreme court, he should not be permitted to join in original action by filing an amended complaint, after his qualification here, so as to have action brought within a year for wrongful death. *Hall v. R. R.*, 149—110.

Deed to land, made by foreign executors, under authority of will, void in this state unless executors qualify here, and operates only as assignment of debt and security. *Scott v. Lumber Co.*, 144—44.

See, also, *Glasscock v. Gray*, 148—349.

Injury to body.—Where employees of railroad were retained in its employment, after injuries to a body by it, this was a ratification. *Kyles v. R. R.*, 147—398.

Possession of dead body for purpose of burial belongs, in absence of testamentary disposition, to surviving husband or wife or next kin, and when widow lived with husband at time of his death, her right is paramount to that of next of kin. *Ibid*, 147—398.

Where rights of one legally entitled to custody of dead body are violated by mutilation of body or otherwise, party injured may in action for damages recover for mental suffering caused by the injury. *Ibid*, 147—399.

Wife not entitled to recover any-

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thing for grief at seeing mutilated body of husband in coffin. *Ibid*, 147—402.

Where dead body was struck by passing trains and dismembered portions were scattered along track for 24 hours, punitive damages proper if jury find this was wantonly done. *Ibid*, 147—401.

If defendant permitted mutilated body to lie along its track with knowledge of section master, for long time while waiting for coroner to come, action lies though section master in good faith acted under a mistaken sense of duty to remove body and prepare it for burial. *Ibid*, 147—406.

For a body to be struck after death by trains going in both directions and knocked backwards and forwards along track for nearly 24 hours, is an infringement upon legal right of wife to have body for burial in condition in which it was when life became extinct. *Ibid*, 147—397.

Letters.—Issue of letters of administration cannot be collaterally attacked in action for wrongful death. *Plemmons v. R. R.*, 140—286.

When will is probated after letters of administration have issued, clerk should revoke letters and notify administrator, and until notice, his acts done in good faith are valid. *Shober v. Wheeler*, 144—403.

Payment.—Presumption of payment arises only between executor and legatee, debtor and creditor. *Outlaw v. Garner*, 139—190.

Legatee who has received his legal share of estate is not liable to account to another legatee, who, by reason of a devastavit, fails to receive his share. *Sprinkle v. Holton*, 146—264.

If one legatee is paid more than his share and by some unforeseen cause for which executor is not responsible, it turns out upon final settlement that some legatees have been overpaid, after making good

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to other legatees their share, he may have relief in equity against the overpaid legatees. *Ibid*, 146—264.

Public.—In action to fix resulting trust on land bought by one at public sale for another, both deceased, testimony of witnesses who are parties and interested in result of action as to conversation between deceased parties tending to establish trust, is incompetent. *Harrell v. Hogan*, 150—244.

Public administrator does not hold a public office, and quo warranto does not lie. *S. v. Smith*, 145—476.

Qualification.—Brother of testatrix has right to qualify in preference to public administrator at any time before latter has qualified. In *re Bailey Will*, 141—194.

Real estate assets.—Action by administrator appointed more than ten years after death of intestate, and over a year after passage of Rev., 367, to subject land to payment of judgments, is barred. *Mathews v. Peterson*, 150—133.

Renewal and resignation.—Court will not remove executor by reason of insolvency, when such condition existed at time will was executed and was known to testator, unless it appears that he is wasting or misapplying the assets. In *re Knowles*, 148—464.

In absence of any such reason, or any well grounded apprehension that devastavit will be committed, bond will not be required. *Ibid*, 148—464.

In absence of statutory authority, clerk has no right to permit personal representative to resign. *McIntyre v. Proctor*, 145—291.

Sales by.—Where no order to stay proceedings upon filing caveat, sale by executor valid. *Carraway v. Lassiter*, 139—146.

Power under will to executors to sell land is valid, but does not include power to give option to purchase. *Trogon v. Williams*, 144—192.

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Statute with reference to hours of public sales does not apply to private sales by administrator. *Odell v. House*, 144—649.

If executor fails to obtain as much at private sale as he could have got at public vendue, he is liable for difference. *Ibid*, 144—648.

Where executor sells land of testator under will and takes note secured by purchase price, interest of devisees and legatees in lands merge into note and can not be reinstated in land without consent of all parties. *Sprinkle v. Holton*, 146—258.

Services to decedent.—In action against executor, evidence of services "rendered" to testator, incompetent. *Stocks v. Cannon*, 139—60.

Witness may testify to any "substantive and independent fact," not personal transaction with deceased. *Davidson v. Barden*, 139—1.

Testimony of plaintiff that she "gave him medicine, prepared his nourishment, etc.," incompetent in action against administrator. *Ibid*, 139—1.

In action for services rendered defendant's intestate, evidence as to what work one did, incompetent under Rev., 1631. *Dunn v. Currie*, 141—123.

In action to recover for services to decedent, plaintiff can not testify as to contract. *Ibid*, 141—126.

Presumed in certain relations that no payment was expected and plaintiff must rebut presumption. *Ibid*, 141—127.

Law implies promise of parent to pay for services rendered him by adult child who had married and removed from parent's home. *Winkler v. Killian*, 141—575.

When a child after arrival at full age continues to reside with and serve parent, it is presumed that service is gratuitous. *Ibid*, 141—580.

In absence of fraud or gross neglect, claim for services rendered should be reduced by amount actually received by him in use of intestate's property. *Ibid*, 141—575.

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EXECUTORY DEVISE.

Will gave to son in Mississippi privilege to return and take certain land, or remain and receive other property; estate in land here never vested when he remained in Mississippi. *Pitchford v. Limer*, 139—9.

Such estate being executory devise, doctrine that conditions in restraint of alienation are void, does not apply. *Ibid*, 139—9.

EXPRESS COMPANIES.

Generally.—An express company guarantees the promptest possible delivery, and is liable for any deterioration in value of goods caused by failure to fill that contract. *Lambert v. Express Co.*, 146—323.

Express company is liable for value of goods at date of shipment, though it did not know of contents of package, where goods have suffered no physical injury, but have lost their value because of delayed shipment. *Ibid*, 146—322.

Where goods are ordered for special purpose or present use in given way, and these facts are known to carrier, he is responsible for damages fairly attributable to delay. *Furniture Co. v. Express Co.*, 148—90.

Shipment of heavy shaft by express indicates that it was designed for present use in a mill and that some injury would result from delay in transit. *Ibid*, 148—97.

FACTS.

Findings of.—In injunction, findings of fact by judge not conclusive on appeal, but judgment presumed to be correct, and burden is upon appellant to show error. *Hysatt v. DeHart*, 140—270.

Approval by judge of clerk's findings of fact, conclusive; unless the exception that there is no evidence, is sustained. *Carraway v. Lassiter*, 139—145.

Supreme court bound by judge's findings of facts in habeas corpus. *Parte McCown*, 139—95.

Upon motion to dismiss, judge should find facts, not simply that

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facts in affidavits are true. *Higgs v. Sperry*, 139—299.

Where there was evidence to sustain findings as to abandonment of contract, findings not reviewed by supreme court. *May v. Getty*, 140—310.

Question of.—Public highway, what is. *Cozard v. Hardwood Co.*, 139—288.

FALSE IMPRISONMENT.

In action for false arrest and detention, where plaintiff was not touched or her liberty restrained by any kind of force or show of force, a mere unasserted purpose to forcibly detain her would not be sufficient. *Powell v. Fiber Co.*, 150—14.

Act relied upon as an unlawful arrest in order to constitute false imprisonment must have been intended as such and so understood by party arrested. *Ibid*, 150—14.

Action for false arrest by defendant's servants, employed to collect its debts, will not lie, in absence of allegation in complaint or evidence that tort was committed by servants in scope of their authority in furtherance of master's business. *Ibid*, 150—14.

False imprisonment may be committed by words alone, or acts or threats; confinement in prison not necessary, nor can one justify upon ground that he was summoned by co-defendant. *Martin v. Houck*, 141—318.

False Warranty.

See Fraud and Mistake; Warranty.

Father.

See Parent and Child.

Federal Question.

See Removal of Causes.

Fees.

See Costs; Principal and Agent, compensation.

Fee Simple.

See Deeds; Rule in Shelley's Case; Wills; Estates.

FELLOW SERVANT.**Fellow Servant.**

See Master and Servant, fellow servant act.

Feme Covert.

See Married Women; Husband and Wife; Estoppel; Jurisdiction.

Fidelity Companies.

See Insurance; Bonds.

Fiduciaries.

See Executors and Administrators; Principal and Agent; Guardian and Ward; Trusts.

Findings.

See Judge, findings; Reference.

Fires.

See Railroads, fires; Contracts, building.

Fishing.

See Hunting and Fishing.

Fixtures.

See Landlord and Tenant, removal of fixtures.

Flag Station.

See Railroads, failure to stop at station.

FORCIBLE ENTRY AND DETAINER.

In action for false arrest and detention, where plaintiff was not touched or her liberty restrained by any kind of force or show of force, a mere unasserted purpose to forcibly detain her would not be sufficient. *Powell v. Fiber Co.*, 150—14.

Act relied upon as an unlawful arrest in order to constitute false imprisonment must have been intended as such and so understood by party arrested. *Ibid*, 150—14.

Foreclosure.

See Mortgage, foreclosure.

FRAUD AND MISTAKE.**FORFEITURES.**

Generally.—Forfeitures not favored by law and when incurred can only be enforced in manner pointed out in contract. *Frazier v. Gibson*, 140—272.

Code provision that failure to pay purchase money for land entered, within prescribed time, works a forfeiture, does not apply to Cherokee lands. *Ibid*, 140—272.

Fraud.

See Fraud and Mistake; Statute of Frauds.

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Generally.—Mistake in court not an essential feature, harmless error. *Eubanks v. Alsbaugh*, 139—520.

In action to set aside deed for fraud, evidence competent as corroborative. *Hodge v. Hudson*, 139—358.

Complaint alleging mistake in quantity of land, need not aver false or fraudulent misrepresentation. *Peacock v. Barnes*, 139—193.

For relief from defect of title or shortage in judicial sale, must be brought to attention of court before payment and confirmation. *Ibid*, 139—193.

In absence of fraud, purchaser at judicial sale only required to see that court had jurisdiction of person and subject matter. *Carraway v. Lassiter*, 139—146.

Equity will correct mistake of fact or law, which violates manifest intention of parties. *King v. Hobbs*, 139—173.

Evidence sufficient on ground of mistake. *Ibid*, 139—171.

Statute runs from discovery of facts constituting fraud; not from discovery by party of rights hitherto unknown to him. *Bonner v. Stotesbury*, 139—4.

Fraud and mistake, Code, sec. 155 (a), applies when? *Ibid*, 139—4.

To correct bond for title on ground of mistake, evidence must be strong, clear and convincing. *King v. Hobbs*, 139—170.

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One can not escape liability for representations because other party was negligent in relying on them, and where he resorted to artifice to induce other party to forego inquiry. *May v. Loomis*, 140—351.

Representations are statements of facts, and not mere matters of opinion, when. *Ibid*, 140—352.

Instructions on fraud in this case correct. *Caldwell v. Ins. Co.*, 140—100.

In action to set aside deed for fraud, defendant had purchased interest of his co-defendant, amount of recovery stated. *Sprinkle v. Wellborn*, 140—163.

In case of insane person law presumes fraud from condition of parties, it being stronger or weaker according to condition of parties. *Ibid*, 140—163.

To rescind contract, injured party must act promptly after discovery of fraud; he may not rescind in part and affirm in part. *May v. Loomis*, 140—351.

Contract for sale of timber, reserving a well defined class of trees, defendant wrote contract and included reserved trees, when execution obtained by false representation, plaintiff may sue in deceit. *Griffin v. Lbr. Co.*, 140—514.

Burden is upon plaintiff to show alleged fraud by testimony clear, cogent and convincing. *Ibid*, 140—515.

Law affords no redress, in absence of fraud, to one who signs deed without reading, or requiring it to be read to him. *Ibid*, 140—520.

One guilty of fraudulent conduct not allowed to cry "negligence" against his own deliberate fraud. *Ibid*, 140—521.

Where one relies upon his legal title only, without averment of undue influence or fraud in treaty, evidence of such properly excluded, but evidence of mental capacity of plaintiff's ancestor to execute deed under which defendant claimed, and evidence of fraud in factum, competent. *Alley v. Howell*, 141—113.

Fraud and undue influence are foreign to allegation of legal title

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and can not be put in evidence unless defendant has notice by appropriate allegations in complaint. *Ibid*, 141—114.

In action to set aside deed of trust for fraud, there was evidence that it was not to secure bona fide debt but to secure feigned debt and deprive plaintiff of his security, motion to dismiss denied. *Tyner, v. Barnes*, 142—110.

Where jury found that defendant's deed of trust was registered prior to plaintiff's deed, which was older in date, was not purchaser for value, not necessary to defeat defendant's claim that there be actual fraud on his part. *Ibid*, 142—110.

Action to recover overcharge for mistake in deed, accrues from time fraud or mistake was known or should have been discovered by exercise of ordinary care. *Peacock v. Barnes*, 142—215.

In action to recover overcharge for mistake in deed, assurance of commissioner as to quantity, personal knowledge purchaser has of land and extent of deficit, questions for jury. *Ibid*, 142—215.

In action to set aside deed for fraud, statement of attorney of grantee, he now being dead, to plaintiff upon execution of deed, incompetent. *Smith v. Moore*, 142—277.

Any conduct practiced at auction sale for purpose of stifling competition, or false representations or deception employed to acquire property at less than its value, is a fraud and vitiates sale. *Davis v. Keen*, 142—497.

Fraud must be clearly and directly pleaded. *Merrimon v. Paving Co.*, 142—540.

If one be illiterate, unable to read, and a paper writing be read to him falsely, and he sign it, it shall not be his act or deed. *Hayes v. R. R.*, 143—125.

In action for personal injuries, defendant sets up release, not necessary to return money before setting up plea that release was procured by fraud in factum; but if

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he recovers, amount paid will be deducted. *Ibid.*, 143—125.

In action for personal injuries, plaintiff executed full release, but denied that it contained the terms of settlement, and there was evidence of negligence and fraud, it was a question for jury. *Ibid.*, 143—125.

Evidence in action to correct deed for fraud, insufficient. *York v. Westall*, 143—276.

In suit to set aside verdict and judgment in former action for fraud, allegation in complaint of fraud and suppression of material evidence alone is insufficient. *Moore v. Gulley*, 144—81.

Unless fraud or deceit has been practiced, or something done or said to put party off his guard at time written document is delivered and accepted, it is his duty to read it. *Floars v. Ins. Co.*, 144—241.

To enable holder of policy to recover in accordance with previous oral contract differing from written policy, the written policy must be corrected, either for fraud or mistake. *Ibid.*, 144—232.

To correct mistake in written policy, must be alleged and shown that mistake was actual, and when agent is of limited powers, must be shown that policy as claimed is one within power possessed by agent, express or implied. *Ibid.*, 144—233.

In action to recover premiums paid on life policy, alleged to have been induced by fraudulent representations of agent, the plaintiffs, nearly illiterate, do not waive their rights by such acceptance of policy or payment of premiums, having read the policy without understanding it and being subsequently assured by agent that policy was as he represented it, question of fraud is for jury. *Sikes v. Ins. Co.*, 144—626.

Expressions of commendation or opinion or extravagant statements as to value or prospects do not, as a rule, constitute legal fraud. *Frey v. Lbr. Co.*, 144—762.

When evidence disclosed that deed was executed and induced by those in friendly intercourse and

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habitual reliance for advice, it raises a presumption of fraud as matter of fact, to pass before jury for its worth. *Balthrop v. Todd*, 145—114.

A return, or offer to return what one has received under contract induced by fraud, is not condition precedent to action for deceit. *Modlin v. R. R.*, 145—223.

Where one intentionally asserts a fact to be true of his own knowledge, when he does not know whether it is true or false, he is culpable, if another is thereby injured, as one who makes assertion which he knows to be untrue. *Ibid.*, 145—226.

Substitution of a deed for a will, by a confidential friend, is the grossest moral fraud. *Smith v. Moore*, 145—271.

Where married woman at time of signing contract to convey land, believed it conveyed only the timber, and before its execution she was correctly informed as to its contents, privy examination related back to signing of deed. *Lbr. Co. v. Leonard*, 145—339.

Where judicial act of magistrate in taking acknowledgment, is being inquired into, and feme defendant alleges its execution through mistake, it is competent to show by officer that if she had made any such statement of her mistake at time, he would not have probated deed. *Ibid.*, 145—339.

Certificate of examination of married woman in due form, supported by evidence, can only be attacked by clear, strong, cogent and convincing proof. *Ibid.*, 145—340.

Certificate of privy examination shuts off all inquiry into fraud, duress or undue influence in the treaty, unless participated in by grantee or his agent. *Ibid.*, 145—345.

To avoid will for undue influence, influence complained of must be controlling and partake to some extent of nature of fraud. *In re Abee*, 146—274.

Evidence of circumstances will support the finding of fraud, if sufficient to reasonably satisfy the

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mind of the judge or jury. *Tuttle v. Tuttle*, 146—489.

In action to set aside deed made by defendant, commissioner appointed to sell land for partition, made to his co-defendants, burden is upon plaintiff to show fraud by a preponderance of evidence only. *Ibid*, 146—485.

A registered deed would not put parties upon inquiry of matters of fraud not appearing upon its face, and would not fix them with notice of fraud. *Ibid*, 146—493.

In action to set aside sale, decree and deed made thereunder, by reason of fraudulent agreement to deprive plaintiffs of their property, statute bars proceeding instituted three years after actual discovery of fraud. *Ibid*, 146—493.

Where statute of limitations is pleaded in action to set aside sale, decree and deed for fraud, plaintiff should reply, setting out, by way of avoidance, the time when they aver the fraud was discovered, the burden being upon them to show facts to repel the statute. *Ibid*, 146—493.

Where plaintiff alleged fraud and collusion, and may be able to establish this charge at next trial, and when defendant failed to renew motion to nonsuit, at close of all evidence, supreme court will not dismiss action but award a new trial. *Rackley v. Roberts*, 147—209.

Commendatory expressions or exaggerated statements as to value or prospects, by puffing up value and quality of goods, or holding out flattering prospects of gain, are not regarded as fraudulent in law. *Williamson v. Holt*, 147—520.

Where plaintiff, a machinist, examined an ice plant before buying it, and knew that plant had been a failure, he is liable in action for purchase money, even though exaggerated statements as to what plant might do were made to him and partially influenced the sale. *Ibid*, 147—521.

It is no defense that contract was not drawn according to oral agreement, where it was not read and there is no suggestion that maker

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was prevented from reading it or put off his guard by fraud, artifice, deception or other wrongful act of other party. *Medicine Co. v. Mizell*, 148—387.

When negotiable instrument sued on has been procured by fraud, one claiming to be holder in due course must show that he acquired title before maturity, in good faith for value, without notice of any defect in title of person negotiating it, and this question is for jury. *Bank v. Fountain*, 148—593.

Where one is general agent of another, who relies upon him as friend and adviser, and has entire management of his affairs, a presumption of fraud, as matter of law, arises from a transaction between them wherein the agent is benefited, and burden is upon him to show that transaction was open, fair and honest. *Smith v. Moore*, 149—197.

To establish actionable fraud, it is not always required that false representation should be knowingly made. Under certain conditions if party to bargain avers existence of material fact recklessly when he is consciously ignorant whether it be true or false, he may be held for a falsehood, especially when the parties are not upon equal terms. *Whitehurst v. Ins. Co.*, 149—276.

Requisites for action for deceit, stated. *Ibid*, 149—277.

False representations sufficient to avoid a written contract may be shown by parol as a defense in action for alleged damages sustained by its breach. *Tyson v. Jones*, 150—182.

Court will not lend itself to establish a right growing out of a fraudulent transaction, but this principle only applies when it becomes necessary to invoke the aid of the court to establish or assert the right arising by reason of such a transaction, and does not obtain when the right otherwise exists. *Gaylord v. Gaylord*, 150—235.

Future promises.—Fraudulent promises as to future, as to what vendee could do with property, how

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much he could make on it, etc., do not constitute legal fraud. *Williamson v. Holt*, 147—522.

Arrest for.—To entitle plaintiff to execution against the person, it is incumbent upon him to secure an affirmative answer to the issue of fraud. *Organ Co. v. Snyder*, 147—272.

Where debtor charged with fraud, is in custody, and has scheduled all of his property, answer to petition denying statement made therein as to the reaching of his interest in land by an execution, does not raise an issue of fraud. *Edwards v. Sorrell*, 150—718.

Sections 735-737 and 1920 of *Revisal*, prescribing methods by which a prisoner may be discharged, in certain instances before judgment, should be construed together. *Ibid*, 150—715.

In treaty and factum.—Where one signs the paper writing which he intended, but is induced to do so by means of false representation, this is fraud in the treaty. *Griffin v. Lbr. Co.*, 140—514.

Knowledge of.—Where one purchases fruit preservative containing sulphur, and its use is forbidden, action for deceit does not lie when he subsequently, with full knowledge, made a second trade with defendant. *Smith v. Alphin*, 150—426.

Remedies.—Where defendant obtained property by fraudulent representations, plaintiff may sue for damages for false warranty, or repudiate trade and recover specific property. *Joyner v. Early*, 139—49.

Deed obtained from illiterate man by fraud, proper case for jury. *Hodge v. Hudson*, 139—358.

Where one sued on contract and judgment is uncollectible, no bar to action for damages for deceit. *Machine Co. v. Owings*, 140—504.

Remedy of vendor not defeated where fraudulent vender has sold property to innocent purchaser. *Sprinkle v. Wellborn*, 140—164.

Remedies of purchaser when sale effected by actual fraud. *May v. Loomis*, 140—351.

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Where parties not at arms length with reference to false representations, buyer's claim for relief for fraud not barred because they were negligent. *Ibid*, 140—351.

Courts of equity will set aside judgments of their own and other states for fraud practiced in procuring them. *Levin v. Gladstein*, 142—489.

There is no contract where plaintiff proposed to sell a certain kind of machine, and defendant to buy another and different kind, but if he receive and convert to his use machine shipped, he is liable for its value, and his counterclaim for difference in price of machine must fail. *Machine Co. v. Chalkley*, 143—181.

Equity will set aside conveyance made under power of sale in mortgage, procured through collusion with administrator in fraud of rights of heirs, in absence of intervening rights of creditors or purchasers. *Morton v. Lbr. Co.*, 144—31.

Demurrer to complaint, alleging false parol testimony as to material fact upon trial of former and different action between same parties is properly sustained. Equity requires party seeking it to be free from laches, and production of higher grade of evidence than mere parol. *Moore v. Gulley*, 144—81.

Plaintiff in action for recovery of land, upon proof of averment of mistake, may have deed in chain of title corrected, and facts upon which equity is claimed must be alleged. *Webb v. Borden*, 145—188.

In action for fraudulently obtaining deed for more timber than was intended to be conveyed, statute of limitations begins to run when plaintiff first discovered the facts, or by exercise of proper and reasonable care could have discovered them. *Ibid*, 145—220.

When one has, by his promise to buy, hold or dispose of real property for benefit of another, induced action or forbearance by reliance upon such promise, it would

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be a fraud that the promise should not be enforced. *Russell v. Wade*, 146—121.

Proper method to impeach judicial proceedings for fraud is by civil action, and not by motion. *Tuttle v. Tuttle*, 146—492.

Independent action lies to set aside judgment in former proceeding or in a civil action upon ground of fraud, or when it involves some other equitable element, when relief can only be had in that way. *Rackley v. Roberts*, 147—206.

Whether one may rescind his subscription or defend his obligation therefor for fraud, after corporation has become insolvent and its affairs are in hands of receiver, is a question; but he must act with promptness and due diligence both in ascertaining fraud and taking steps to repudiate obligation. *Chamberlain v. Trogden*, 148—141.

When one's property has been obtained from him by actionable fraud, he can follow and recover it from wrong-doer as long as he can identify and trace it, unless in hands of purchaser in good faith and for value. *Mfg. Co. v. Summers*, 143—102.

See, also, *Modlin v. R. R.*, 145—223.

Fraud, Statute of.

See Statute of Frauds.

Fraudulent Conveyances.

See Deeds, fraudulent; Registration.

Free Trader.

See Married Women, free trader.

Freight.

See Railroads; Carriers.

Fright.

See Negligence, fright.

Frightening Animals.

See Highways, frightening objects upon.

GUARANTY.**Frivolous Answer.**

See Pleading.

Futures.

See Contracts, against public policy.

GARNISHMENT.

Payment by master in garnishment proceeding in another state, good defense to action by servant for services, where he was personally served. *Wright v. R. R.*, 141—164.

Power over person of garnishee confers jurisdiction on court of the state where writ issued against him, without regard to "situs of debt." *Ibid*, 141—164.

General Assembly.

See Legislature.

Grand Jury.

See Jury.

Grants.

See Deeds, grants.

GUARANTY.

Generally.—Statement by one that "I will guarantee that debt of corporation will be paid on that date," is a guarantee of payment and not simply of collection, and on default of principal defendant's obligation to pay becomes absolute. *Mudge v. Varner*, 146—149.

The obligation of one as guarantor of payment must be evidenced and established by written agreement or some written note or memorandum, signed by him or by some person duly authorized to sign for him. *Supply Co. v. Finch*, 147—107.

Written promise by one to pay debt of others, that "he would pay their bill as soon as the dry kiln gets in operation," refers to an account stated and antecedent, and such is not enforceable for lack of a valuable consideration. *Ibid*, 147—110.

GUARANTY.

Where one has become surety upon faith of creditor's representation that another will become co-surety, he is not bound if that other does not join, and in equity it makes no difference that guaranty was under seal. *Bank v. Jones*, 147—421.

New note given for antecedent debt evidenced by note raises presumption that it was not intended as an extinguishment, and burden is upon sureties to show that satisfaction was intended. *Ibid*, 147—421.

Liability of guarantor or surety cannot be enlarged by construction. *Shoe Co. v. Peacock*, 150—548.

When bond was given by debtor, endorsed by surety, providing for payment of \$1,000 on debts then due or which might be received by obligee, subsequent payment of \$700, should be credited upon bond, and not to pay debts received after date of bond. *Ibid*, 150—547.

GUARDIAN AD LITEM, AND NEXT FRIEND.

Minor husband needs no guardian ad litem when he has no interest in land, and wife owns but life estate. *Carraway v. Lassiter*, 139—146.

Appointment of guardian ad litem, when irregular, but harmless error. *Ibid*, 139—145.

Superior court may at any time, during progress of trial, remove guardian ad litem for cause. *Ibid*, 139—145.

Infant without general guardian may appear by next friend, and judgment rendered in such proceeding, otherwise valid, is binding upon their rights. *Settle v. Settle*, 141—553.

Next friend for infant suing in justice's court, may be appointed either by justice or clerk. *Houser v. Bonsal*, 149—55.

Failure to appoint next friend or guardian ad litem is irregular, but defect is not jurisdictional and

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judgment is not void. *Ibid*, 149—55.

GUARDIAN AND WARD.

Generally.—When uncle of infant eleven years old has been appointed guardian without notice to relatives having custody, guardian can assert his right to custody by civil action, or relatives may take appropriate steps to set aside guardianship. In *re Samuel Parker*, 144—170.

In this country, disposition of the child rests in sound legal discretion of court, and it will be exercised as the best interests of the child may require. *Ibid*, 144—173.

Where court found that infant eleven years old is in custody of aunt, and she and her husband are of good character and properly supporting child, as to mental, moral and spiritual welfare, that uncle, petitioner in habeas corpus proceedings, and appointed without notice, has contributed nothing to support of child, order that it is for best interest of child that he remain with aunt, will not be disturbed, no illegal restraint being shown. *Ibid*, 144—170.

Failure to notify relative in custody of child of proceedings to appoint guardian is an irregularity under *Revisal*, sec. 1772, which does not render appointment void, but is not conclusive upon relative. *Ibid*, 144—170.

Where guardian has sold ward's land, without receiving purchase price, contrary to order of sale, proper to grant restraining order if before rights of others have intervened. In *re Propst*, 144—562.

Good faith, due diligence and separation of trust funds from personal funds are required of guardian in dealing with ward's money. *Duffie v. Williams*, 148—532.

Accounts.—No statute runs against an express trust, and trust is terminated upon death of ward, and her distributees should then have administration taken out and call for an accounting. *Lowder v. Hathcock*, 150—439.

GUARDIAN AND WARD.

Appointment.—When jury finds that person, subject of inquisition of lunacy, is incompetent from want of understanding to manage her own affairs, it is sufficient, under Revisal 1890, to authorize clerk to appoint guardian. In re Denny, 150—424.

Investments.—Where guardian was indebted to ward, and he loaned his own money and took security in his name as guardian, and security subsequently proved to be worth less than its face, ward may disaffirm transaction upon arrival at majority and demand full amount due. Duffie v. Williams, 148—532.

HABEAS CORPUS.

Writ of habeas corpus never performs office of appeal. Ex parte McCown, 139—95.

Supreme court bound by judge's findings of facts in habeas corpus. Ibid, 139—95.

Judge should find material facts in evidence upon which his judgment is based. Newsome v. Bunch, 142—19.

Except as between parents under Revisal, sec. 1853, right of custody of child cannot be determined under habeas corpus. In re Samuel Parker, 144—170.

While in habeas corpus proceedings concerning custody of children, power of court is ordinarily restricted to freeing them from illegal restraint and allowing them to select their placing, this is only true where child is of years of discretion and sufficient intelligence to determine question for himself. Ibid, 144—174.

State may not appeal from order releasing defendant in habeas corpus proceeding. In re Williams, 149—437.

Defendant cannot plead to indictment and set up pardon as bar to future prosecution, as it can only be issued after conviction. Its validity can only be tested in habeas corpus. Ibid, 149—438.

HARMLESS ERROR.

Handwriting.

See Evidence, handwriting; Jury, exhibiting papers to.

HARMLESS ERROR.

Mistake of court not essential feature, harmless error. Eubanks v. Alspaugh, 139—520.

Where issues submitted fairly present controverted question of fact, refusal to submit issues tendered, no error. Cunningham v. R. R., 139—427.

See, also, Jackson v. Tel. Co., 139—347.

Issues embodying evidentiary facts not approved of, but if no harm come to appellant therefrom, no error. Jackson v. Tel. Co., 139—347.

Not reversible error to refuse instruction, where afterwards given by court in its charge. Yarborough v. Hughes, 139—200.

Appointment of guardian ad litem, when irregular, but harmless error. Carraway v. Lassiter, 139—145.

Harmless error, when? Dixon v. Jones, 139—75.

"If you believe from the evidence," inexact, but not reversible error unless appellant prejudiced. Merrell v. Dudley, 139—57.

Exception to admission of evidence which, if irrelevant, was harmless, is without merit. Board of Education v. Makely, 139—30.

Where plaintiff's action barred, any error committed as to permanent damages, is harmless upon nonsuit. Cherry v. Canal Co., 140—422.

Where judge was misled as to form of defendant's contract, calling the jury back and removing any impression on their minds by reason of such misapprehension, not prejudicial. Buggy Co. v. Dukes, 140—394.

Error committed as to instructions upon issue eliminated by verdict, harmless. Sprinkle v. Wellborn, 140—165.

Omission to charge upon given point not error unless there is

HARMLESS ERROR.

prayer to instruct. *State v. Morley*, 141—764.

Use of word "directly" instead of "proximately" with reference to contributory negligence, not prejudicial. *Ruffin v. R. R.*, 142—120.

Omission to submit issue of contributory negligence when pleaded and there is evidence to sustain plea, not reversible error when court fully explained several phases of testimony relied on to show it, and defendant got benefit of such testimony. *Ibid*, 142—120.

Where charge of court was taken by jury to their room, but by oversight special prayers asked by appellant and given, were not handed to jury, and his counsel present in court did not then, or before verdict, call this to court's attention, no error. *Gaither v. Carpenter*, 143—240.

Error in admission of evidence is cured when judge withdraws it from jury and instructs them not to consider it. *Medlin v. Simpson*, 144—397.

When by agreement depositions were read upon trial and plaintiff subsequently testified that witness was at home sick, for purpose of showing that she was unable to attend in person, is harmless. *Whitehurst v. R. R.*, 146—590.

When of a series of telegrams one is admitted in evidence as received in reply to those sent by party offering them, and it does not appear to have any connection with the others and has no bearing upon the facts at issue, it is harmless error. *Edwards v. Erwin*, 143—433.

Submission of an issue that does not prejudice rights of complaining party, though unnecessary, the whole case being correctly determined upon another issue, is harmless error. *Rudisill v. Whitener*, 149—441.

If a question of law is submitted to jury and they decide it correctly, error is cured by verdict. *Hardy v. Ward*, 150—395.

When judge excluded certain evidence, which he thereafter, at

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close of all evidence, offered to admit, and witnesses had not been discharged, error, if any, was cured. *Nail v. Brown*, 150—534.

Health.

See Nuisance, public.

Hearsay.

See Evidence, hearsay; Competency; Admissions and Confessions.

Hertford County Act.

See Ejectment.

HEIRS.

Generally.—Upon death of remainderman, previous disposition of interest terminates, and heirs at law of remainderman entitled to immediate enjoyment of property. *Hooker v. Bryan*, 140—407.

"Heirs now living," "children," "issue," etc., are words of limitation or purchase as will best accord with manifest intention of him who employs them. *Smith v. Proctor*, 139—314.

Deeds conveying legal estate without word "heirs," conveys fee if it contains conclusive, intrinsic evidence that fee was intended and word "heirs" omitted by mistake. *Ibid*, 139—314.

If word "heirs" appears in premises, habendum or warranty, it will be transferred to that portion of deed which will cause same to operate as fee. *Ibid*, 139—314.

Prior to 1879, word "heirs" generally necessary to create fee, but not so in devises or equitable estates. *Ibid*, 139—314.

Child en ventre sa mere, when deed executed, takes in common with living children. *Campbell v. Everhart*, 139—502.

Deed to "heirs" of living person passes title of grantor to children of such person. *Ibid*, 139—502.

Where will directs that all property be sold upon death of wife, and proceeds divided among testator's children, only children living at death of widow share in pro-

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ceeds. *Freeman v. Freeman*, 141—97.

"Lawful heir" does not at all mean "legitimate," but the person designated by law to take by descent. *Harrell v. Hagan*, 147—115.

An estate to D for life and then to heirs of S, who was then alive, is operative as to the conveyance of the remainder under Revisal, 1583, which construes word "heirs" to mean children. *Condor v. Secrest*, 149—207.

Estate of son for life, and at his death to his surviving heirs, is a fee. *Price v. Griffin*, 150—523.

HICKORY.

Inconvenience to the public, causing delay incident to operation of railroad and enlargement of freight depot in center of city, not a nuisance. *Hickory v. R. R.*, 141—716.

HIGHWAYS.

Frightening objects upon.—In action for damage for frightening horse by broken down traction engine, evidence of gentle nature of horse was proper. *Davis v. Thornburg*, 149—234.

Use of.—Traction engine may lawfully traverse public highway, and when it breaks down on highway, it becomes the duty of owner to remove it within a reasonable time, this depending upon the circumstances. *Davis v. Thornburg*, 149—234.

Hinsdale Act.

See Evidence, nonsuit.

HOLIDAY.

Opening and allowing depositions, pursuant to notice, on a legal holiday, is proper. Distinction between holiday and Sunday as being non juridicus, discussed. *Latta v. Elec. Co.*, 146—308.

HOMESTEAD.

Allotment.—Appraisal and allotment of homestead under execution is void, where it appears upon face

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of return that debtor was absent, by no fault of his own. *McKeithen v. Blue*, 142—360.

Failure of clerk to notify defendant of issue of execution upon dormant judgment is at most an irregularity, and if officers had sold excess, without objection, stranger purchasing without notice would have acquired title. *McKeithen v. Blue*, 149—98.

Exemptions, evasion of.—Court of equity may enjoin resident creditor from instituting action in another state so as to evade exemption laws of this state. *Wierse v. Thomas*, 145—264.

Statute passed for protection of laborer's wages are effective for his protection, and where debt is contracted in this state and his wages are attached in suit brought in Georgia to evade our exemption laws, injunction lies. *Ibid*, 145—268.

Not allowed.—One who leaves the state for purpose of evading judgment in criminal action against him, and his whereabouts are unknown, is not entitled to exemptions. *Cromer v. Self*, 149—167.

Hotels.

See Innkeeper.

HUNTING AND FISHING.

Fishing, when prohibited by law, is, a public nuisance. *Daniels v. Homer*, 139—219.

Fishing and hunting rights in Albemarle and Pamlico Sounds, rest in state and subject to legislative control. *Ibid*, 139—219.

Seizure and sale of nets under acts of 1905, chap. 292, constitutional exercise of police power. *Ibid*, 139—219.

General Assembly may regulate fisheries on private property. *State v. Sutton*, 139—574.

HUSBAND AND WIFE.

Generally.—Minor husband needs no guardian ad litem when he has no interest in land and wife owns

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but life estate. *Carraway v. Lassiter*, 139—146.

Unauthorized declarations of husband of feme plaintiff, who has no interest in land in controversy, not evidence. *Daugherty v. Taylor*, 140—446.

Husband entitled during coverture to full control and use of land held by entirety to exclusion of wife. Same as to personal property. *West v. R. R.*, 140—620.

Husband may sue for and recover in his own name injuries to wife that deprive him of her services or society; and if injuries are permanent, he can recover for future diminished capacity for labor on her part. *Kimberly v. Howland*, 143—399.

Neither spouse can sue other in tort for slander and libel. *State v. Fulton*, 149—489.

Abandonment.—Action for support under Code 1292, dismissed when. *Bidwell v. Bidwell*, 139—402.

Abandoned wife may use her property for her support, though husband living in state. *Vandiford v. Humphrey*, 139—65.

When wife abandoned she may contract before six months expire in which to bring divorce. *Ibid*, 139—65.

Husband's abandonment of wife, instruction correct. *Ibid*, 139—65.

Conveyances.—If husband while insolvent and indebted to wife, pays money to her for alleged loan, burden is upon her to show that he owed her a debt—one for recovery of which she could have maintained an action against him and enforced payment, and that money was received by her in discharge of debt. *Parker v. Fenwick*, 147—529.

Conveyance to husband and wife, and three children, husband and wife take a fourth. *Darden v. Timberlake*, 139—181.

Conveyance to husband and wife, upon her death he acquires her interest. *Ibid*, 139—181.

Deed to "S and wife, A, and their heirs, including former children

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of A by another husband," tenants in common. *Ibid*, 139—181.

In action to declare wife a trustee for benefit of insolvent husband, instructions proper. *Parker v. Fenwick*, 147—529.

Essential to creation of estate by entirety that spouses be jointly entitled as well as jointly named in the deed, and if wife alone be entitled to conveyance, and it is made to her and her husband jointly, the latter will not acquire the whole by survivorship, nor is his second wife, upon his death, entitled to dower. *Sprinkle v. Spainhour*, 149—226.

Where deed conveys land to husband and wife, and the wife and her heirs, and it is so stated in the premises and habendum, husband takes life estate by the courtesy, and wife owns the fee. *Ibid*, 149—225.

Where heirs of father undertook to pass deeds amongst themselves, and deed to one of daughters was made to her husband and herself, and her heirs, this would not change the character of the estate of heirs. *Ibid*, 149—224.

Husband may mortgage his right to receive rents and profits from land held by entirety. *Bynum v. Wicker*, 141—96.

When, after marriage, husband and wife derive title to land jointly, they are seized of the entirety, and neither is entitled to a division hereof by partition proceedings, or of money derived as proceeds of a voluntary sale of timber cut therefrom. The nature, incidents and properties of this estate by entirety were not changed by provisions of the constitution relating to married women. *Jones v. Smith*, 149—319.

Interest of husband in land conveyed to him and his wife, is not subject to execution during their joint lives. *Hood v. Mercer*, 150—700.

Husband entitled during coverture to full control and usufruct of land held by entirety to exclusion

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of wife. Same as to personal property. *West v. R. R.*, 140—620.

Injury to marital rights.—Action for attempted seduction of wife lies in favor of husband, and vindictive damages may be assessed. *Brame v. Clark*, 148—367.

Interest in wife's land.—The husband, in whose name wife's land was listed for taxes, cannot, in his own right, attack sheriff's deed for taxes given to purchaser. *Eames v. Armstrong*, 146—2.

Where wife was entitled as distributee to fund in hands of another and she died before its collection, and thereafter her husband, who had qualified as her administrator, became non compos, fund belonged to husband's guardian. *Neill v. Wilson*, 146—245.

Idiot.

See Contracts, non compos mentis; Fraud and Mistake.

Illegitimacy.

See Marriages, slaves; Bastardy; Parent and Child, legitimating issue.

Impeachment.

See Verdict, impeachment; Evidence, impeachment.

Improvements.

See Betterments; Landlord and Tenant, removal of fixtures.

Imputed Negligence.

See Negligence, imputed.

Indemnity.

See Guaranty.

INDEPENDENT CONTRACTOR.

Generally.—Independent contractor defined. *Young v. Lumber Co.*, 147—31.

Contract between independent contractor and defendant is admissible to show its relation with laborers, and need not be set up in answer. *Ibid.*, 147—35.

INDEPENDENT CONTRACTOR.

In action for injuries, it is well to submit question whether one is independent contractor of defendant, to jury in separate issue. *Ibid.*, 147—35.

Facts in this case make defendants independent contractors. *Gay v. R. R.*, 148—343.

Who is an independent contractor. *Midgett v. Mfg. Co.*, 150—344.

Liability of.—Where independent contractor built railroad by plans of engineers, and on account thereof plaintiff's land was sogged after contractor had completed and turned over road to company, contractor is not liable. *Willis v. White*, 150—204.

Damages against independent contractor for flooding lands caused by construction of road by improper plans furnished by railroad company's engineers, if allowed at all, can only be assessed up to time of trial, as contractor has no right to go upon roadbed after turning it over to master. *Ibid.*, 150—205.

For the flooding of plaintiff's land, permanent damages against railroad may be recovered in one action, but independent contractor if liable at all for constructing roadbed according to plans furnished by railroad company's engineers, cannot be for any other damage than accrued prior to completion of work and delivery to owner. *Ibid.*, 150—203.

Duty of master who leases mill to independent contractor, stated. *Midgett v. Mfg. Co.*, 150—340; Plaintiff must show that his intestate was in employ of defendant, and he may show that person in charge was not his servant, if he can, and that property was not under his control at the time, and accident was caused by stranger, independent contractor or other person. *Midgett v. Mfg. Co.*, 150—342.

Court refuses to hold that one may, under form and semblance of independent contractor, operate

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second-hand mill, in bad repair and dangerous to employees, for purpose of sawing logs, and escape liability for injuries to employes, who, in good faith, and upon reasonable grounds, supposed they were working for owner of mill. *Ibid*, 150—345.

Where character of work to be done was essentially dangerous, duty to use due care could not be delegated to independent contractor by owner. *Ibid*, 150—345.

Infancy.

See Parent and Child; Guardian and Ward; Negligence, children; Damages.

IN FORMA PAUPERIS.

Where plaintiff sued in forma pauperis, and was subsequently required by judge to give bond, whereupon he took a nonsuit, he may institute new action in forma pauperis, within one year, and former order requiring giving of bond is not res adjudicata. *Rich v. Morisey*, 149—43.

INJUNCTION.

Generally.—On hearing of injunction, title not required to be proved with same strictness as upon trial. *Moore v. Fowle*, 139—51.

When plaintiff satisfies court his claim is bona fide and shows apparent title to timber, injunction should continue till title determined. *Ibid*, 139—51.

Courts of this state have no power to control by mandamus or injunction supreme council of foreign fraternal society. *Brenizer v. Royal Arcanum*, 141—410.

Plaintiff asking injunctive relief should make a full, fair, frank statement of essential facts upon which right is based. *Tobacco Co. v. Tobacco Co.*, 145—379.

Injunction will not lie to restrain cutting of certain trees when no time limit is fixed. *Woody v. Timber Co.*, 141—472.

INJUNCTION.

Court will not restrain officers of church from leasing small portion of lot for store purposes on ground of breach of trust, though lot conveyed for church purposes. *Hayes v. Franklin*, 141—599.

No action lies in state court to enjoin trespass upon property attached in that court, and afterwards, removed to federal court. *Coffin v. Harris*, 141—707.

On appeal from order refusing or continuing an injunction to the hearing, supreme court can review findings of fact made by court below. *Burns v. McFarland*, 146—383.

Usually injunction does not lie in advance when apprehended injury is doubtful, contingent or eventual and this applies to industrial enterprises which give promise of benefit to community, but not where it affects health of adjoining proprietors. *Cherry v. Williams*, 147—456.

Proof to be made before railroad entitled to injunction for obstructing right of way. *R. R. v. Olive*, 142—257.

All questions incident to appeal from order continuing restraining order to the hearing are carried by appeal to supreme court, and trial judge has no power thereafter to hear motion to set aside judgment for newly discovered evidence. *Combes v. Adams*, 150—70.

When the injunction has not been served, if party to be affected has been made aware of its being issued or that it is about to be issued, and knowingly and intentionally violates it, or does an act to render the order of no effect, such person may be attached for contempt of the process. *Davis v. Fiber Co.*, 150—87.

Before what judge returnable.—Judge holding special term may issue restraining order, and hear case within his jurisdiction, but where no pleadings have been filed, and summons not yet returnable, resident judge should hear and determine the case. *Royal v. Thornton*, 150—294.

INJUNCTION.

Continued to hearing.—Generally when the injunctive relief sought is itself the main relief, court will continue it to hearing. *Hyatt v. DeHart*, 140—270.

Decision of an appeal from an order continuing or refusing to grant interlocutory injunction, no estoppel. *Soloman v. Sewerage Co.*, 142—439.

When main purpose of action is to obtain permanent injunction, if evidence raises a serious question as to existence of facts which make for plaintiff's right, preliminary order will be continued to hearing. *Tise v. Whitaker*, 144—507.

In action to try title to timber lands and for injunction, proper to forbid either party to cut where it is found to be a good faith contention on both sides. *Sherrod v. Battle*, 147—11.

User of hospital for tuberculosis and contagious diseases in residential portion of thickly settled community, should be enjoined till hearing. *Cherry v. Williams*, 147—456.

When there is a bona fide controversy as to ownership of land, order restraining cutting of timber was properly continued to the hearing. *Davis v. Fiber Co.*, 150—88.

Lies.—Where verdict gives plaintiff right to fund in bank as against one defendant, who is insolvent and has attempted to misappropriate it, payment of cashier's check, endorsed to other non-resident defendant, will be restrained till rights of parties determined. *Mfg. Co. v. Summers*, 143—102.

One who owns sawmill on banks of navigable river and procures logs for his mill coming down river both above and below a proposed bridge, is an abutting owner and may enjoin maintenance of railroad draw-bridge below his mill as public nuisance. *Pedrick v. R. R.*, 143—485.

Where charter gave railroad right to construct draw-bridge over

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navigable river, temporary injunction denied, where evidence as to whether bridge was a nuisance if constructed above or below town, and a fourth of the work had been done before application made. *Ibid*, 143—486.

Injunction lies to protect or safeguard property taken into custody of court by attachment. *Coffin v. Harris*, 141—708.

Injunction and receivership lie to prevent threatened destruction or removal of property, pending proceeding for partition. *Thompson v. Silverthorne*, 142—13.

Citizen in own behalf and that of all other taxpayers may sue in equity to enjoin governing body of city from making unauthorized appropriation of corporate funds. *Merrimon v. Paving Co.*, 142—539.

Railroad entitled to injunctive relief against interference with its right of way, without regard to solvency of defendants. *R. R. v. Olive*, 142—257.

Injunction proper remedy to prevent fouling stream by improper use. *Durham v. Cotton Mills*, 141—615.

Interest of contingent remainderman in timber will be protected from waste by court of equity by injunction. *Latham v. Lumber Co.*, 139—9.

Court of equity may enjoin resident creditor from instituting action in another state so as to evade exemption laws of this state. *Wierse v. Thomas*, 145—264.

Statute passed for protection of laborer's wages is effective for his protection, and where debt is contracted in this state and his wages are attached in suit brought in Georgia to evade our exemption laws, injunction lies. *Ibid*, 145—268.

Placing personal property on tax list and adding back taxes, has effect of a judgment, but assessment is invalid where owner is given no hearing before assessors or an opportunity to be heard in court, and permanent injunction against

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proceeding by sheriff to sell, is proper. *Lumber Co. v. Smith*, 146—202.

When refused.—Injunction against prosecution of enterprises tending to develope resources of the country, will ordinarily be refused. *Hyatt v. DeHart*, 140—270.

A mere enterer is not entitled to an injunction to restrain another claimant from cutting timber. *Frasier v. Gibson*, 140—277.

Injunction denied in advance of creation of alleged nuisance, when act complained of may or may not become nuisance, or when injury apprehended is doubtful. *Hickory v. R. R.*, 143—451.

Equity will not restrain a private nuisance that is merely dubious, possible or contingent. One is not entitled to injunction for public nuisance unless he show special damage. *Durham v. Cotton Mills*, 144—709.

Preliminary injunction will not issue in a doubtful case, and unless the court be convinced with reasonable certainty that complainant must succeed at final hearing, writ should be denied. *State v. Ry.*, 145—543.

Injunction does not lie to restrain use of street, abutting on plaintiff's land, for railroad purposes, where plaintiff bought his land long after building of road and with knowledge of its use. Courts never enjoin construction or use of public utilities and improvements at suit of private individuals unless damage is both serious in amount and irreparable in character. *Staton v. R. R.*, 147—439.

When one gave part of his land to a brother, by will, and subsequently deeded same land to a son, who conveyed to defendant, it cannot be enjoined from cutting timber, for title under deed vested before that under will. *Harris v. Lumber Co.*, 147—633.

Collection of entire tax levy will not be enjoined if portion conceded to be valid can be separated

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from portion in controversy. *R. v. Comrs.*, 148—225.

Courts are reluctant to interfere with municipal governments in exercise of discretionary powers, conferred upon them for public weal, and will never do so unless action should be so clearly unreasonable as to amount to oppressive and manifest abuse of discretion. *Rosenthal v. Goldsboro*, 149—134.

Denied.—It is against the policy of law to restrain industries and such enterprises as tend to develop the country and its resources, and injunction will not lie where railroad companies, upon request of town and upon order of Corporation Commission, have erected a union depot and laid their tracks in obedience to the order. *Griffin v. R. R.*, 150—315.

Injunction does not lie to prevent courts in another state from proceeding in cause, but residents may be required to desist. *Weirae v. Thomas*, 145—264.

Where new road has been laid off and old road abandoned, court will not restrain working of new road pending appeal of landowner. *Sutphin v. Sparger*, 150—519.

INNKEEPER.

Generally.—Public innkeeper is liable to his guest for safety of latter's goods, when placed infra hospitium and which he has with him for purpose of journey, except as to act of God, public enemy, or fault of guests or his servants. *Holstein v. Phillips*, 146—369.

Difference between boarding house and public inn, and liability of keepers for loss of goods of guest, discussed. *Ibid*, 146—370.

Keeper of hotel at summer resort is liable to his guest for loss of goods, as provided in Revisal 1913. *Ibid*, 146—371.

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The law will not lend its aid where contract appears to have been entered into by both contract-

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ing parties for express purpose of carrying into effect that which is prohibited by law. *Vinegar Co. v. Hawn*, 149—357.

INSANITY.

When insanity is once shown to exist, presumed that it continues until there is evidence of restoration. *Beard v. R. R.*, 143—136.

The fact that one has "spells," during which his mind was affected, does not relieve plaintiff of burden of showing insanity. *Hudson v. Hudson*, 144—454.

Sanity is generally presumed until contrary be proved. If a general derangement be once established, burden is shifted to the other side, and sanity is then to be shown at time act was done. *Ibid*, 144—453.

INSANE PERSON.

Discharge of.—Original discharge papers, or records of executive committee of asylum showing discharge of testator, may be competent, but books containing copies of these papers in clerk's office, incompetent. *In re Thorp*, 150—491.

When one has been discharged from asylum law presumes in absence of evidence to contrary, that he was sane. *Ibid*, 150—491.

INSOLVENT DEBTORS.

Who entitled to provisions.—Defendant in action for alienation of affections of plaintiff's wife, may take insolvent debtor's oath, and upon his filing a full and true inventory of all his property, with encumbrances thereon, he is entitled to his discharge from custody. *Edwards v. Sorrell*, 150—717.

Allegation that title was taken in name of husband and wife to defraud husband's creditor's, where he paid for land and procured deed in June, 1907, and liability was created in March, 1909, not sustained. *Ibid*, 150—717.

INSURANCE.

Inspection of Writings.

See Parties, examination of.

INSURANCE.

Generally.—Funds arising from assessments by fraternal society, for benefit of widows and orphans of deceased members, not subject to attachment. *Brenizer v. Royal Arcanum*, 141—409.

Courts of this state have no power to control by mandamus or injunction supreme council of foreign fraternal society. *Ibid.*, 141—410.

Burden is upon insurer to show how it came in possession of policy, when it disappeared from one's possession shortly prior to death of insured, and not upon beneficiary that it was obtained by fraud. *Lanier v. Insurance Co.*, 142—15.

Beneficiary of ordinary life policy generally has vested interest in contract the moment it is executed and delivered. *Ibid*, 142—15.

Insurance company cannot limit time within which action is to be brought less than a year, or bringing of new action after nonsuit to less than six months, and where nonsuit taken and it does not appear when, presumed that new action brought within time. *Parker v. Ins. Co.*, 143—345.

Though oral contract of insurance or to insure will be upheld generally, such contract merges into written policy subsequently accepted by insured, and rights of parties must be determined by its terms and conditions. *Floars v. Ins. Co.*, 144—232.

To enable holder of policy to recover in accordance with previous oral contract, differing from written policy, the written policy must be corrected, either for fraud or mistake. *Ibid*, 144—232.

Insured is not conclusively bound by stipulation inserted in policy without his knowledge or consent. *Ibid*, 144—237.

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Mistake of soliciting agent as to policy to be issued, which was contrary to rules of the company, and which it did not authorize, cannot be imputed to company. *Ibid*, 144—233.

Where certificate of insurance and death is shown, burden is on defendant to show non-payment of dues or other matter to avoid policy. *Wilkie v. National Council*, 147—638.

Abandonment.—Where insurer was authorized by its charter to write both assessment and old line policies, and it ceased issuing assessment policies and plaintiff voluntarily ceased payment on that account, nonsuit proper. *Green v. Ins. Co.*, 139—313.

Where plaintiff ceased payment and abandoned his policy, he cannot ask damages for its cancellation. *Ibid*, 139—309.

When policy provides for two years and two months extended insurance, this refers to date when premium, which has not been paid, falls due, and not the date of delivery of policy. *Ibid*, 146—521.

The thirty days of grace allowed merely provide against a forfeiture and do not extend the term of insurance. *Ibid*, 146—523.

Receipt by company of partial payment of back dues on lapsed policy is no evidence in itself of a waiver, when, under terms of policy, payment of "all back dues" was necessary to reinstate policy. *Melvin v. Ins. Co.*, 150—398.

Where by-law provided that any member, who failed to pay within thirty days after notice of assessment, he shall be dropped and new membership fee required to renew insurance; and insured having failed to pay assessment of which he had notice, was dropped, he was not entitled to reinstatement three months after forfeiture of policy and when his health had become hopelessly impaired. *Hay v. Assn.*, 143—256.

Provision that member may be

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reinstated if approved by medical director and president, and while in good health, is valid, and approval required is not a mere ministerial act, but involves exercise of judgment. *Lane v. Ins. Co.*, 142—55.

By-law providing that notice of assessments may be given by mail, is valid, and to sustain a forfeiture, defendant must show mailing of notice, properly addressed, within time fixed. *Duffy v. Ins. Co.*, 142—103.

But plaintiff may show that he never received notice of assessment, for failure to pay which his policy was cancelled. *Ibid*, 142—103.

Accident.—In action on accident policy providing for indemnity for total disability, no recovery can be had after insured is engaged in same service, occupation and at same salary as prior to injury. *Rayburn v. Casualty Co.*, 141—425.

No action lies for indemnity for any time subsequent to summons. *Ibid*, 141—425.

Application for.—In action to recover premiums paid on life policy, demurrer to evidence properly overruled, where plaintiff, an illiterate colored woman was induced to take policy upon false representation of agent that she could get amount due her at end of ten years. *Caldwell v. Ins. Co.*, 140—100.

Every fact untruly asserted or wrongfully suppressed must be regarded as material, if knowledge or ignorance of it would influence judgment of insurer in making contract at all, or in estimating degree and character of risk, or in fixing rate of premiums. *Fishplate v. Casualty Co.*, 140—589.

Knowledge of local agent of falsity of statement by insured in application, upon which policy was issued, is knowledge of the company, and will not avoid contract in absence of evidence of actual fraud on part of agent and insured. *Ibid*, 140—589.

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Equity will reform life policy to accord with representations made by defendant's agents, which are false and fraudulent, relied upon by an illiterate man and accepted by him as the one he supposed it to be. *Sykes v. Ins. Co.*, 148—13.

When insurer has induced insured to take policy by false representations that principal and interest would be paid in five years, failure to make demand and continuing to pay for a similar period under like conditions, is not a waiver of his right. *Stroud v. Ins. Co.*, 148—54.

Provision in standard fire policy for assent of insurer to additional insurance upon property, is valid. *Black v. Ins. Co.*, 148—169.

Declarations in form of an estimate, made by agent to effect insurance, competent upon question of fraud, and question is for jury, where there is doubt whether they were received as estimates or material statements. *Whitehurst v. Ins. Co.*, 149—273.

Where life policy requires payment of premium in advance, and policy was delivered nine days after date stated upon its face, insurance year began to run from first date. *Wilkie v. Ins. Co.*, 146—519.

Policy delivered upon condition that it would be effective only if advance premium were paid in lifetime and good health of insured, is not binding when these conditions have not been complied with by him. *Perry v. Ins. Co.*, 150—43.

In absence of statutory inhibition, oral contract of insurance is binding, and law will read into contract the standard policy as fixed by statute, and to recover on such policy, claimant must comply with material requirements of policy or establish a waiver on part of company. *Floars v. Ins. Co.*, 144—235.

When policy which complies with application has been unconditionally delivered, it is conclusive, in absence of fraud, that contract

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exists. *Waters v. Annuity Co.*, 144—663.

Upon question of false representation in application, that insured was temperate in use of liquors, witness may state that he had known insured, and from his observation of him he was temperate. *Taylor v. Security Co.*, 145—383.

When assured stated in his application that he had not been under care of physician within twelve months, not necessary that he should be bedridden, but if he was apprehensive as to his condition, though up and down, and he consulted a physician, it would be a material representation, and if false, would vitiate contract. *Bryant v. Ins. Co.*, 147—181.

Statement by insured in his application that he had not been under care of a physician in two years, and such conditions and other relevant facts relating to truth or falsity of statement, should be considered by jury. *Ibid*, 147—181.

Assessments.—Member may show non-receipt of notice of assessment as reason for its nonpayment, notwithstanding by-law providing for forfeiture for failure to pay after mailing of notice. *Sherrod v. Ins. Assn.*, 139—167.

The right of each policyholder in defendant company is to have an assessment made to pay his loss, and he has no claim upon an amount paid to another policyholder. *Perry v. Ins. Assn.*, 139—380.

Court may order defendant to levy assessment, under its charter, to pay plaintiff's claim, and appoint a receiver for that purpose. *Ibid*, 139—381.

When insured takes policy on his life for another's benefit and pays or arranges for payment of premiums himself or on his own account, and not as a cloak for a wagering contract, it is not void for lack of insurable interest. *Pollock v. Household of Ruth*, 150—211.

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Voluntary payments of premiums made by insured with knowledge of facts, cannot be recovered. *Jones v. Assurance Society*, 147—540.

Assessments to become due from policyholders residing in this State will not be, when due, debts or choses in action, which the company could enforce. *Blackwell v. Life Assn.*, 141—117.

Where policy provides that part of assessments be set apart for certain purpose, court cannot, through a receiver, compel payment of assessments to be appropriated to plaintiff's claim, in violation of terms of contract and right of fellow members. *Ibid*, 141—117.

Rights acquired by subrogation do not depend upon written assignment of claims. Upon payment by insurer, it is assigned in equity. *Ibid* 139—436.

Assignment.—If action is assignable, at law or in equity, assignee is real party in interest and equitable owner must sue in own name. *Cunningham v. R. R.*, 139—427.

An assignment is substantially a transfer, actual or constructive, with clear intent at time to part with all interest in thing transferred and with full knowledge of rights so transferred. *Ormond v. Ins. Co.*, 145—142.

Where insured directed insurer to cancel his policy and issue a separate paid-up policy, the amount being equally divided among his children, which was done, there is evidence for jury of an assignment. *Ibid*, 145—143.

Business associates.—Corporation has no right or power, if a stockholder objects, to use its funds to pay premiums on policy on life of one who is not now an officer of corporation, and where policy was taken with intent to assign it. *Victor v. Mills*, 148—118.

Cotton mill has no right to insure life of its president for its benefit and pay premiums, in absence of express authority, and val-

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idity of assignment of policy to one having no insurable interest, is denied. *Ibid*, 148—117.

By-laws.—By-law of insurance company relative to notice of assessment, may be rebutted by showing non-receipt. *Sherrod v. Ins. Assn.*, 139—167.

By-law of insurance company providing for notice of assessments to be given member, by mail, properly addressed, is valid. *Duffy v. Ins. Co.*, 142—103.

By-laws of assessment company when assented to by members, as provided in charter, constitute measure of duty and liability, when reasonable and not violative of any provision of public law. *Ibid*, 142—103.

Whether by-law is reasonable, question of law for court. *Ibid*, 142—103.

By-law of assessment company that certificate of treasurer or bookkeeper is conclusive as to mailing notice, invalid. *Ibid*, 142—103.

Plaintiff may show that he never received notice of assessment, for failure to pay when his policy was cancelled. *Ibid*, 142—103.

Change of beneficiary.—In absence of restriction in general law or charter, or some rule of company, member of benevolent order holding policy may change beneficiary at his election. *Pollock v. Household of Ruth*, 150—213.

Mere payment of premiums for a time, without more, and in absence of binding contract that beneficiaries then designated should receive proceeds of policy, would not support the claim of the original beneficiary to equitable interference for his protection. *Ibid*, 150—214.

Cancellation.—Where insured terminated policy, because it was not what he bought, and upon his death before acceptance of proposition to cancel, the negotiation was off and insurance remained effective.—*Waters v. Annuity Co.*, 144—664.

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Concurrent.—Condition in fire policy that other insurance taken upon the property without the assent of the insurer would render the policy void, is valid, and unless waived, will be enforced. *Black v. Ins. Co.*, 148—171.

Notice that plaintiff intended to get other insurance in the future is not notice of existing insurance at the time the policy issued. *Ibid*, 148—175.

Days of grace.—Thirty days grace allowed in policy merely provides against a forfeiture, and cannot be construed to extend the term of insurance limited in face thereof. *Wilkie v. Ins. Co.*, 146—522.

Delivery of policy.—In absence of fraud, delivery of policy is conclusive proof that contract is completed and premium received during good health. *Rayburn v. Casualty Co.*, 141—425.

Where policy which complies with the application has been unconditionally delivered, in absence of fraud, it is held to be conclusive evidence that contract of insurance exists between the parties. *Waters v. Annuity Co.*, 144—670.

Delivery is largely question of intent and physical act of turning over policy may be explained by parol evidence. It does, however, make a prima facie case that there is a completed contract as contained in policy. *Ibid*, 144—670.

Insurance year as to life policy begins from time fixed in face of contract, though delivered subsequently. *Wilkie v. Ins. Co.*, 146—512.

Where policy is delivered upon condition that it is to become effective upon payment of first premium, during good health, if it was delivered without payment and insured decided afterwards to accept it, defendant should have been notified of his intention, and premium paid or tendered while he was in good health. *Perry v. Ins. Co.*, 150—145.

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Where there has been an actual delivery of policy, nothing else appearing, production of it at trial presents a prima facie case for plaintiff. *Ibid*, 150—145.

Extended.—Where insured has ceased paying premiums on life policy, period of extended insurance to which he was entitled should be computed from pay day for premiums therein specified, and not date of actual delivery. *Wilkie v. Ins. Co.*, 146—520.

Forfeiture.—Insurer not estopped though it had notice that insured intended to do something contrary to terms of policy, and it did not object. *Weddington v. Ins. Co.*, 141—234.

Insurer may insist on forfeiture of policy before it is required to return or tender unearned premium. *Ibid*, 141—234.

Upon breach of condition which vitiates policy, not necessary to declare forfeiture but insurer may wait till claim is made. *Ibid*, 141—235.

Fraud of agent.—In action upon life policy alleged to have been induced by false representations of agent, plaintiff by his conduct may waive right to rely upon representations. *Cathcart v. Ins. Co.*, 144—623.

In action upon life policy alleged to have been induced by false representations of agent, instructions proper. *Ibid*, 144—623.

In action to recover premiums paid on life policy, alleged to have been induced by fraudulent representations of agent, the plaintiffs, nearly illiterate, do not waive their rights by such acceptance of policy or payment of premiums, having read the policy without understanding it and being subsequently assured by agent that policy was as he represented it, question of fraud is for jury. *Sikes v. Ins. Co.*, 144—626.

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Courts of equity will reform policy in accordance with representations made by agent, which are false and fraudulent, relied on by insured, and reasonably induced him, an illiterate man, to accept it as the one he supposed it to be. *Sykes v. Ins. Co.*, 148—20.

Contract will be reformed if there was mutual mistake of parties in drafting it, or if one was induced by fraud of other party to enter into contract to his injury. *Ibid.*, 148—20.

Where ignorant man was induced by fraudulent representations of agent to take life policy, which was not the contract he thought he was buying, measure of damages is amount paid in, with four per cent. it being rate provided in policy, and defendant is not entitled to deduct actual cost of insurance for the ten years it was to run. *Ibid.*, 148—22.

Where one has taken life insurance by reason of false and fraudulent representations of agent that all premiums paid would be repaid him at end of five years, at which time he called for his money and he was induced by similar representations to stay in another five years, he may sue for entire amount paid in. *Stroud v. Ins. Co.*, 148—55.

When assurances of value are seriously made, intended, accepted and reasonably relied upon as statements of facts, inducing a contract, they may be so considered in determining whether there was fraud, and if declaration is in the form of an opinion or estimate and there is doubt as to whether they were intended and received as expressions of opinion, question is for jury. *Whitehurst v. Ins. Co.*, 149—276.

To establish actionable fraud, it is not always required that false representation should be knowingly made. Under certain conditions if party to bargain avers existence of material fact recklessly when he is consciously ignorant whether it be true or false, he may

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be held for a falsehood, especially when the parties are not upon equal terms. *Ibid.*, 149—276.

Health.—When insured files claim for sickness up to a fixed date and executes receipt for such amount, language will be restricted to amount then due, and not extended to cover claim for indemnity for future sickness. *Moore v. Casualty Co.*, 150—155.

Iron Safe Clause.—"Iron Safe Clause" in policy does not apply here. *Bray v. Ins. Co.*, 139—390.

Where iron safe clause in fire policy allows thirty days for making inventory, etc., and fire occurs within that time, action lies. *Parker v. Ins. Co.*, 143—339.

Limitation of liability of fire insurance company contained in iron safe clause is reasonable and valid. *Coggins v. Ins. Co.*, 144—7.

When amount of insurance is specifically apportioned to buildings and goods in fixed amounts as to each, and premium is entire and risks substantially identical, obligation is single and insured cannot recover as to either when he fails to produce books and inventory required by contract. *Ibid.*, 144—7.

Under iron safe clause, it is not a compliance with contract for insured to produce a general statement of aggregate values. *Ibid.*, 144—7.

Inventory under iron safe clause must show a detailed enumeration of articles composing stock and value of each, so that it may appear that articles are embraced in contract, and that price of each and sum total are reasonable. *Ibid.*, 144—7.

Insurable Interest.—One may take out insurance on his own life and pay or arrange for payment of premiums himself, unless such arrangement is a mere cloak for a wagering transaction, and this is not within the rule that one who takes insurance upon the life of another must have an insurable interest in his life. *Pollock v. Household of Ruth*, 150—213.

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License.—Revisal 4701, authorizing revocation of license of foreign insurance company when it attempts to remove case to federal court, is valid. *Ins. Co. v. Comr.*, 144—442.

Revisal 4701, does not apply to removal of a cause in which agent sues for services rendered. *Ibid*, 144—442.

Members.—Member of mutual association has right to have assessment made to pay his loss, but he has no claim upon amount paid to another member. *Perry v. Ins. Assn.*, 139—374.

Notice of claim.—Clause in health policy providing for notice of illness to be given company within ten days of its being contracted, is binding upon insured and failure to give notice waives the benefits. If one should suddenly become unconscious and notice not given in ten days, quere? *Williams v. Casualty Co.*, 150—598.

Obtained by fraud.—An illiterate colored woman induced to take a policy upon false representation of defendants agent, demurrer to evidence overruled. *Caldwell v. Ins. Co.*, 140—100.

Instructions on fraud in this case correct. *Ibid*, 140—100.

Statements made in application upon which policy was issued, that applicant had never had any disease of the kidney, etc., is a material representation and if statement is untrue, it will vitiate policy whether fraudulently made or not. *Alexander v. Ins. Co.*, 150—538.

Policies construed.—Clause in policy that it shall be governed by, subject to and construed only by the laws of New York, etc., void. *Blackwell v. Life Assn.*, 141—117.

Contracts and by-laws of incorporated societies, made with reference to general law. *Sherrod v. Ins. Assn.*, 139—167.

Ambiguously worded clause in

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policy construed in favor of insured. *Bray v. Ins. Co.*, 139—390.

Stipulation that policy shall be void if personal property is mortgaged, valid. *Weddington v. Ins. Co.*, 141—234.

Provision in life policy that "delinquent members may be reinstated if approved by medical director, etc.," is valid. *Lane v. Ins. Co.*, 142—55.

Where language in policy admits of two interpretations, that one is usually adopted which, without violence to words selected by parties, will sanction the claim and cover the loss, but rule will never be carried so far as to make contract for parties different from what they made themselves. *R. R. v. Casualty Co.*, 145—116.

Policy liberally construed in favor of insured. *Jones v. Casualty Co.*, 140—262.

See, also, *R. R. v. Casualty Co.*, 145—116.

Premiums.—To recover premiums paid on insurance obtained by false representation of defendants agent, amount paid with interest measure of relief. *Caldwell v. Ins. Co.*, 140—100.

Proof of payment of premiums on life policy till June, 1905, and admission that insured died April, 1905, makes *prima facie* case. *Thaxton v. Ins. Co.*, 143—33.

Acceptance of assessments when overdue does not constitute waiver of terms of policy, nor amount to agreement that premium need not be paid promptly, especially where there was great delay and insured's health was hopelessly impaired. *Hay v. Assn.*, 143—256.

When amount of insurance is specifically apportioned to buildings and goods in fixed amounts as to each, and premium is entire and risks substantially identical, obligation is single and insured cannot recover as to either when he fails to produce books and inventory required by contract. *Coggins v. Ins. Co.*, 144—7.

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When a premium is paid, the date to which it is paid, within meaning of policy, is the day on which next premium will be due, as fixed by the terms of contract. *Wilkie v. Ins. Co.*, 146—523.

Annual premiums stipulated in face of life policy, to be paid at a day certain, are but parts of a fixed total, and not to be considered strictly as made for a full year, but as payments to be made on a particular day of the year. *Ibid*, 146—519.

Stipulation in life policy as to form of receipt for premium has no application where money is actually received and apportioned by company, knowing that it was intended as a payment of premium. *Matthews v. Ins. Co.*, 147—342.

Declarations made by beneficiary in life policy to others as to payment of premiums, competent as corroborative. *Ibid*, 147—342.

An agreement that insured may cease paying alleged excessive assessments pending trial, the amounts to be credited to defendant if plaintiff loses, does not change scope of action and open up questions as to scheme and plan of organization and management of internal affairs of company. *Jones v. Life Assn.*, 150—383.

Policy delivered upon condition that it would be effective only if advance premium was paid in lifetime and good health of insured, is not binding when these conditions have not been complied with by him. *Perry v. Ins. Co.*, 150—144.

Where policy is delivered upon condition that it is to become effective upon payment of first premium, during good health, if it was delivered without payment and insured decided afterwards to accept it, defendant should have been notified of his intention, and premium paid or tendered while he was in good health. *Ibid*, 150—145.

Proof of death.—Returning formal proofs of death and refusal to pay claim waives any defect and acknowledges receipt of requisite

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proof. *Thaxton v. Ins. Co.*, 143—34.

See, also, *Lanier v. Ins. Co.*, 142—19.

Reinstatement.—Where by-law of insurance company gave insured thirty days after notice mailed to him of amount of assessment, and upon failure to pay he shall be dropped, etc., company may refuse to reinstate him after lapse of three months from forfeiture of policy, and his health had become hopelessly impaired. *Hay v. Assn.*, 143—256.

Proofs of loss, though not conclusive and irrebutable by plaintiff, are prima facie true as against him. Burden is upon him to show that statement made in proofs was erroneous in fact, not merely that he made his affidavit as a conclusion from hearsay evidence. *Hill v. Ins. Co.*, 150—4.

Partial payment by decedent of back premiums, under policy providing for reinstatement when "all back dues" should be paid and insured must then be in good health, policy is forfeited where insured died two days after such payment. *Melvin v. Ins. Co.*, 150—399.

Rider.—Effect of rider attached to policy. *Waters v. Annuity Co.*, 144—664.

Subrogation.—See Subrogation.

Suicide.—Provision in life policy that if insured died by his own act or hand, etc., that it vitiates contract, does not refer to accidental death. *Thaxton v. Ins. Co.*, 143—34.

Presumption is against suicide, and burden is on party who seeks to establish it. *Ibid*, 143—34.

Suspension of member.—In action on life policy, officer of defendant may state whether member was in good or bad standing, as this is not a matter of opinion, but one of fact shown by records of local council, and records of local lodge that member had been dropped for non-payment of dues, and record of notice sent to National

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Council of same fact, are competent. *Wilkie v. National Council*, 147—638.

Table of rates.—Where policy provides for assessments of a given amount up to a given age, the words "etc., etc.," at end of table of rates mean "and so on," in corresponding ratio. *Jones v. Assurance Co.*, 147—543.

Waiver of conditions.—Condition in standard fire policy "that no officer, agent or other representative shall have power to waive any provision or condition of the policy," etc., does not restrict the power of such officers to waive such condition, but establishes an invariable rule of evidence as to such waiver and renders parol evidence inadmissible. *Black v. Ins. Co.*, 148—172.

INSURANCE COMMISSIONER.

Statute authorizing service upon insurance commissioner, does not abrogate statute of limitations. *Green v. Ins. Co.*, 139—309.

When policy issued prior to passage of Revisal 4806, and assigned to non-resident, statute does not apply and summons served upon insurance commissioner here, when defendant had previously withdrawn from state and cancelled its power of attorney, is insufficient. *Williams v. Life Assn.*, 145—128.

INTEREST.

Interest cannot be charged sureties on penalty of administrator's bond. *Moseley v. Johnson*, 144—274.

When sale under mortgage securing bond bearing eight per cent. interest is made under power of sale, and purchaser who has taken title, gave option thereon, purchase price stipulated for in option bears six per cent., in absence of agreement. *Alston v. McConnell*, 145—1.

INTERPLEADER.

After merits of case have been passed upon, appeal had and determined by supreme court, inter-

INTOXICATING LIQUORS.

pleader by new parties should not be allowed, but independent action should be brought. *Harrell v. Hagan*, 150—243.

INTERSTATE COMMERCE.

An enactment which may incidentally affect commerce does not necessarily constitute a regulation of it within the meaning of the federal constitution. *Harril v. R. R.*, 144—537.

Revisal 2632, allowing penalty on delayed shipments, does not apply to interstate traffic. *Marble Co. v. Ry. Co.*, 147—56.

Penalty for failure to transport freight in reasonable time does not apply where initial and terminal points are in this state, but shipment necessarily passes through another state in transit. *Ice Co. v. R. R.*, 147—67.

Carrier exercising his calling within a particular state is answerable according to the laws of the state for acts of nonfeasance or misfeasance committed within its limits, and it is liable for penalty for refusal to receive an interstate shipment. *Reid v. R. R.*, 150—762.

INTERSTATE COMMERCE COMMISSION.

Rules and orders of.—Law presumes that carrier has complied with acts of congress and orders of Interstate Commerce Commission in publishing rates to and from points on its road. *Reid v. R. R.*, 150—764.

INTOXICATING LIQUORS.

License.—While Revisal 2073 gives one six months to close out stock of liquors, one is not entitled to new license for this term. *McIntyre v. Asheville*, 146—476.

Sale in prohibited territory.—In action for price of cider sold by plaintiff's predecessor to defendant, evidence that it was intoxicating and that plaintiff had United States license, was competent. *Vinegar Co. v. Hawn*, 149—356.

INTOXICATING LIQUORS.

Judgment will not be given for price of intoxicating cider, when contract was made here, delivery was to be made here and actual delivery was had. *Ibid*, 149—356.

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Generally.—Issues sufficient when germane and each party has fair opportunity to present his version of facts and law. *Wilson v. Cotton Mills*, 140—53.

Where issues submitted fairly present controverted questions of fact, refusal to submit issues tendered, no error. *Cunningham v. R. R.*, 139—427.

Where two issues are independent and clearly severable, discretionary with supreme court to restrict new trial to said issues. *Yarborough v. Hughes*, 139—200.

Refusal to submit issues tendered by appellant if substantially given in charge, no error. *Jackson v. Telephone Co.*, 139—347.

Issues embodying evidentiary facts not approved of, but if no harm come to appellant therefrom, no error. *Ibid*, 139—347.

In action to recover land and for trespass, defendant relies upon equitable matters set out in answer, it is his duty to tender appropriate issues upon which such facts may be found. *Mfg. Co. v. Cloer*, 140—130.

Issue should be directed to matter alleged on one side and denied on other. *Crawford v. Masters*, 140—205.

Generally exception will not lie for failure to submit issues, unless requested by complaining party. *Smith v. Newberry*, 140—385.

Where issue of title raised in processioning proceeding, issue should be transferred to superior court for trial. *Stanaland v. Rabon*, 140—202.

Contributory negligence should not be submitted where answer does not set out facts and default of plaintiff. *Watson v. Farmer*, 141—452.

To answer issue as to defendant's
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negligence "Yes," there must have been a negligent act which was proximate cause of injury. *Harton v. Tel. Co.*, 141—455.

Duty of judge to submit such issues as are necessary to settle material controversies in pleadings, and in absence of such as sufficient to justify those rendered, new trial lies. *Williamson v. Brvan*, 142—81.

Omission to submit issue of contributory negligence when pleaded and there is evidence to sustain plea, not reversible error when court fully explained several phases of testimony relied on to show it, and defendant got benefit of such testimony. *Ruffin v. R. R.*, 142—120.

Issue need not close with the words "as alleged in complaint." *Davis v. Keen*, 142—496.

One's exception to issues submitted is without merit, where they present every phase of the case; are such as arise upon pleadings; are sufficient basis for judgment rendered, and he had opportunity to present every defense he had. *Kimberly v. Howland*, 143—398.

Where this court on former appeal construed the pleadings as raising certain issues, and parties went to trial on the pleadings, too late on this appeal to raise question that issues are not presented. *Bank v. Hollingsworth*, 143—520.

No error to refuse issue tendered if, under issues submitted and under full and correct instructions of judge, with proper reference to evidence, issues of fact involved correctly submitted to jury. *Clark v. Guano Co.*, 144—64.

Not error to refuse issue of fact not raised by pleadings. *Ibid*, 144—64.

See, also, *Streator v. Streator*, 145—338; *Hamilton v. Highlands*, 144—279.

If issues submitted substantially present questions raised by pleadings, they are sufficient. *Ormond v. Ins. Co.*, 145—142.

Exact form of issues is immate-

ISSUES.

rial, if, under them, each party has an opportunity to present evidence of the facts relied on. *Tuttle v. Tuttle*, 146—487.

While the trial judge in his discretion may set aside finding upon an issue as inadequate, he cannot entirely disregard the issue. *Braddy v. Elliott*, 146—583.

Issues which enable parties to present every material phase of controversy are sufficient, and those that are merely evidential facts are properly refused. *Ives v. Lumber Co.*, 147—307.

If issues are sufficiently definite to afford each party opportunity to introduce all pertinent evidence and apply it fairly, they are as a rule unobjectionable. *Dortch v. R. R.*, 148—576.

Issues which are evidential and do not present matters in controversy, properly excluded. *Clothing Co. v. Stadiem*, 149—7.

While every issuable controverted fact, as distinguished from mere evidentiary facts, must be found by the jury upon appropriate issues, it is equally true, to a large extent, that the form of the issues is within the sound judicial discretion of the court. *Rich v. Morisey*, 149—41.

See, also, *Coxe v. Singleton*, 139—361; *Wright v. Cotten*, 140—1.

Too late after verdict to except for failure to submit issue upon statute of limitations, when no such issue was tendered. *Rich v. Morisey*, 149—45.

Issues must be so framed that, when answered, they will be sufficient to support the judgment. *Holler v. Tel. Co.*, 149—338.

Submission of an issue that does not prejudice rights of complaining party, though unnecessary, the whole case being correctly determined upon another issue, is harmless error. *Rudisill v. Whitener*, 149—441.

An issue which assumes the negligence of defendant, a question involved in the pleadings, is not in

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good form. *Crawford v. R. R.*, 150—624.

Proper issues suggested where landlord claims lien, and intervenors claim agricultural lien upon question of entire contract. *Reynolds v. Taylor*, 144—165.

Form of issues is of little consequence, if material facts at issue are clearly presented by them. *Moseley v. Johnson*, 144—263.

Not reversible error to refuse to submit an issue upon particular phase, where each party had opportunity to offer evidence bearing upon every phase of case under issues submitted. *Main v. Field*, 144—307.

Where every phase of contention of parties was fully presented by issues submitted, not error to refuse to submit others. *Johnston v. Lumber Co.*, 144—720.

Discretionary with judge to submit last clear chance under separate issue, or upon issue of contributory negligence. *Sawyer v. R. R.*, 145—24.

Additional.—Submission of additional issues after argument to jury on other issues, is discretionary with court. *Streator v. Streator*, 145—338.

Approved forms.—Issues in action for penalty for delayed shipment should be:

1. Was freight transported and delivered within a reasonable time?

2. In what sum is defendant indebted to plaintiff. *Hamrick v. R. R.*, 146—186.

Proper issues, in action for creating additional burden upon easement, stated. *McCulloch v. R. R.*, 146—319.

In action for injuries, it is well to submit question whether one is independent contractor of defendant, in separate issue. *Young v. Lumber Co.*, 147—35.

Proper issues in action on delayed shipment, stated. *Davis v. R. R.*, 147—70.

Burden of.—Distinction between burden of issue and burden of

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proof. Board of Education v. Makely, 139—30.

Burden of issue never shifts. Ibid, 139—35.

Party who has not burden of issue, not bound to disprove actor's case by preponderance of evidence. Ibid, 139—36.

In ejectment plaintiff alleges title and defendant denies it; showing a prima facie title does not shift burden of proof upon the issue, but defendant must go forward with his evidence. Moore v. McClain, 141—473.

Doctrines of "burden of proof," "Burden of issue," and "prima facie case," discussed and distinguished. Overcash v. Electric Co., 144—573.

The terms "prima facie," "presumptions of negligence," and "burden of issue," distinguished. Furniture Co. v. Express Co., 144—639.

Burden of issue does not shift, but burden of proof may shift from one party to the other, depending upon state of the evidence. When burden of proof shifts from the party originally bearing it, other party is not required to disprove it by preponderance of evidence. Winslow v. Hardwood Co., 147—276.

Tendered.—Not necessary on appeal, for one to tender an issue, when all evidence relevant to it has been excluded. Moore v. Lumber Co., 150—269.

Transferred to civil issue docket.—Clerk may correct mistake made in prematurely ordering land partitioned, by revoking order and directing proceeding to be docketed for trial. Little v. Duncan, 149—85.

Where issue in partition proceeding transferred to civil issue docket, and finally brought before judge, in term time, he should have disposed of it upon its merits. Ibid, 149—85.

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Joinder.

See Parties; Husband and Wife; Negligence, tort feorsors.

Joint Tort Feorsors.

See Negligence, tort feorsors.

Journal of General Assembly.

See Constitutional Law.

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Action for ponding water barred if substantial injury done prior to five years next before suit. Stack v. R. R., 139—366.

Refusal to submit issues tendered by appellant if substantially given in charge, no error. Jackson v. Tel. Co., 139—347.

Abuse of process, proper instruction. Ibid, 139—347.

Where two instructions are conflicting, and impossible to tell upon which the jury acted, error. Pegram v. R. R., 139—303.

Not reversible error to refuse instruction, where afterwards given in charge. Yarborough v. Hughes, 139—200.

Judge's instructions to new commissioners, when set aside. Hawks v. Hall, 139—179.

Instruction upon duty of defendant to provide plaintiff with reasonably safe place to work, correct. Miller v. R. R., 141—46.

Where plaintiff owns equitable title to note, defendant entitled to instruction showing matters of defense between him and endorsee. Tyson v. Joyner, 139—69.

Judge's instructions, what are not. S. v. Dewey, 139—557.

Where swamp land vested in plaintiff, instruction that jury must be satisfied by greater weight of evidence that land described in complaint is swamp land, before they could find for plaintiff, was proper. Board of Ed. v. Makely, 139—30.

Where party requests court to instruct jury to find in his favor, adverse party entitled to have evidence considered most strongly in

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his favor, as in case of motion to nonsuit. *Ibid*, 139—30.

Intestate run over by backing engine, at night, instruction proper. *Reid v. R. R.*, 140—146.

Where judge was misled as to form of defendant's contract, calling jury back and removing any impression on their minds by reason of such misapprehension, not prejudicial. *Buggy Co. v. Dukes*, 140—394.

Court should instruct jury what boundaries are, leaving to them the question where they are. *Jennings v. White*, 139—22.

In adverse possession, plaintiff must show privity in respect to locus in quo between himself and those whose possession preceded his. *Ibid*, 139—22.

Judge not obliged to repeat instructions already given, even when specially asked to do so in prayer. *Sprinkle v. Wellborn*, 140—165.

Where testimony relied upon to sustain contributory negligence is conflicting, refusal to charge jury to answer second issue "Yes," proper. *Davis v. Traction Co.*, 141—134.

If evidence be all on one side and tend one way, judge may charge jury if they find facts to be as testified by witnesses to answer in certain way, but not upon the evidence so to answer it. *Dobbin v. Dobbin*, 141—210.

Where judge fails to charge as to certain phase of case, his attention must be directed to omission by prayer, or failure to charge can not be assigned as error, unless he eliminates substantial part of it to prejudice of one party. *Rumbough v. Sackett*, 141—495.

New trial granted where there are conflicting instructions upon a material point. *Ibid*, 142—341.

Instruction upon ratification of change of account from wife's account to that of husband's, correct. *Yarborough v. Trust Co.*, 142—377.

Contradictory instructions to jury ground for reversal only when instruction adverse to appellant is erroneous. *Mott v. Tel. Co.*, 142—532.

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Proper for court to permit jurors to take his charge with them to jury room. *Gaither v. Carpenter*, 143—240.

Omission of judge to charge upon any particular phase of evidence is not reviewable in absence of prayer for instructions thereto. *S. v. Turner*, 143—641.

Court not obliged to adopt very words of requested prayer, provided it does not change the sense or so qualify the instruction as to weaken its force. *Baker v. R. R.*, 144—41.

Sufficient if judge substantially charges in accordance with proper request. *Brown v. R. R.*, 144—634.

It is presumed that judge charged correctly as to all issues, in absence of showing to contrary. *Gerrock v. Tel. Co.*, 147—8.

Correctness of judge's charge not reviewable in absence of case on appeal duly served and settled. *Clothing Co. v. Bagley*, 147—39.

When charge given presents every phase of controversy, with correct instructions as to the law, new trial will not be awarded for failure to give instructions asked, although they may involve correct propositions of law. *Muse v. R. R.*, 149—452.

Where judge states in his charge that certain admissions were made on trial, if this was not true, it should have been corrected at the time. *S. v. Lance*, 149—555.

Instructions to jury are to be considered with reference to theory upon which case is tried, evidence and contentions of parties. *Cotton v. Mfg. Co.*, 142—528.

Judge not required to give instruction in very words used by counsel, but if he gives it substantially, and does not by any change in language weaken its force, it is sufficient. *Graves v. Jackson*, 150—385.

It is no error for judge to state erroneous contentions of defendant, when he correctly states the law in his charge. *Redman v. R. R.*, 150—407.

Considered as a whole.—Charge

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must be considered as a whole in same connected way in which it was given. *Gilliland v. Board of Ed.*, 141—482.

See also *S. v. Lilliston*, 141—857; *Liles v. Lbr. Co.*, 142—40; *Wilson v. R. R.*, 142—333; *Haines v. Smith*, 149—281; *Revis v. Raleigh*, 150—355.

Charge, erroneous.—When engineer approaching crossing failed to give signals, instruction that relieved traveler of duty to look and listen, erroneous. *Cooper v. R. R.*, 140—209.

Where defendant's counsel in closing speech commented on a fact not relevant to issue and argued erroneous proposition of law, immediately called to court's attention, failure of court to advert to it in charge is error. *Davis v. Evans*, 139—440.

Instructions which assume the alleged controverted facts to be true, is erroneous. *Fuller v. Lumber Co.*, 140—480.

Error for court to decide as matter of law that delay in delivery of telegram seventeen minutes after receipt, was unreasonable. *Kernodle v. Tel. Co.*, 141—436.

Where evidence conflicting, improper to charge jury to answer issue as to contributory negligence "Yes." *Hemphill v. Lbr. Co.*, 141—487.

Instruction that Revisal, 2628, does not apply if plaintiff entered upon platform in bona fide belief that train was not moving, and if reasonably prudent person under similar circumstances would have so believed and acted, was erroneous. *Shaw v. R. R.*, 143—312.

When judge correctly charges the law upon one phase of the evidence, it is incomplete unless embracing the law as applicable to contentions of each party, and such is reversible error. *Jarrett v. Trunk Co.*, 144—299.

Charge that jury should find a certain way, without any direction that they should pass upon evidence or credibility of witnesses, is erroneous. *S. v. Godwin*, 145—463.

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An instruction is erroneous when its effect is to ignore the calls of a grant under which one claims, and adopts a line from a fixed corner subsequently made by the surveyor by construction and not by actual survey upon which patent was issued. *Land Co. v. Erwin*, 150—43.

Expressions used.—"If you believe the evidence," inexact, but not reversible error unless appellant prejudiced. *Merrell v. Dudley*, 139—57.

To charge the evidence of certain witness was competent only as corroborative, and failure to so charge as to similar evidence of others, though called to attention of jury at time, not error. *Liles v. Lbr. Co.*, 142—40.

"He can not recover" should not be used in instruction. *Ruffin v. R. R.*, 142—120.

It is not proper, after laying down a legal proposition, as applicable to a supposed state of facts, if found by the jury, to instruct them as a deduction therefrom, that plaintiff is or is not entitled to recover, but simply to direct them how to answer the issues by applying the law as stated by the court to the facts as they may find them to be. *Miller v. R. R.*, 143—116.

In action upon delayed message, charge that "the message not having been delivered until a week afterwards, law presumes negligence on part of defendant company, but it is not such a presumption as could not be rebutted," correct, but that which follows erroneous. *Shepard v. Tel. Co.*, 143—244.

Venire de novo will be ordered when from peculiar emphasis, or language, or manner in presenting or arraying evidence, judge indicates his opinion upon facts or conclusions of fact. *Withers v. Lane*, 144—184.

Not reversible error for judge to speak of plaintiff as "a boy only twelve or thirteen years of age," when sustained by evidence. *Leathers v. Tob. Co.*, 144—331.

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Exceptions to evidence, and language of judge in withdrawing improper evidence from jury will not be considered on appeal unless taken on the trial at the time. *Daniel v. R. R.*, 145—51.

Not error for judge to speak of defendant's witness as "the Smith woman," when done in a respectful manner. *S. v. Wright*, 145—490.

Judge should charge the jury "if they find from the evidence," etc. *S. v. Godwin*, 145—463.

Error to charge jury "if they believed the evidence they would return a verdict," etc. Proper manner is to instruct "if they find from the evidence," etc. *S. v. Ry.*, 145—570.

It is improper for judge to charge that certain witnesses are not interested in the result of the suit. *S. v. Ownby*, 146—678.

"If you believe the evidence, answer the issue 'Yes' or 'No,'" is erroneous. *Davis v. R. R.*, 147—72.

Where court only allowed damages to the extent of the wrong actually inflicted, to use the word "permanent" damages was not prejudicial. *Spence v. Canal Co.*, 150—160.

Proper.—Correct charge in divorce. *Vandiford v. Humphrey*, 139—65.

In action upon life policy alleged to have been induced by false representations of agent, instructions proper. *Cathcart v. Ins. Co.*, 144—623.

Judge's charge, in action upon delayed message, approved. *Gerock v. Tel. Co.*, 147—5.

Charge on abrogation of rules, approved. *Smith v. R. R.*, 147—610.

Prayers for instructions in adverse possession, commented upon. *Currie v. Gilchrist*, 147—656.

Charge upon liability for ponding water, approved. *Davenport v. R. R.*, 148—293.

Charge in action for trespass, approved. *Haddock v. Leary*, 148—330.

Charge in action for injury to stock in transit, approved. *Jones v. R. R.*, 148—452.

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Charge in this case as to what is meant by a holograph will being found among valuable papers, approved. *Harper v. Harper*, 148—455.

Charge upon undue influence in procuring a deed, proper. *Myatt v. Myatt*, 149—141.

Charge in action to recover land where there are disputed boundaries, approved. *Lance v. Rumbough*, 150—24.

Charge upon assumption of risk, approved. *Rushing v. R. R.*, 149—160.

See also *Rull v. R. R.*, 149—429.

Charge upon master's duty to warn servant of unexpected or unusual movement of train, approved. *Redman v. R. R.*, 150—403.

Charge as to master's duty to furnish servant safe place to work, appliances, etc., approved. *Midgett v. Mfg. Co.*, 150—346.

See also *Blevins v. Cotton Mills*, 150—498.

Witnesses singled out.—Not error for judge to speak of defendant's witness as "the Smith woman," when done in a respectful manner. *S. v. Wright*, 145—490.

Written.—Request to put charge in writing, made at close of evidence, and before argument began, is in apt time. *Metal Co. v. R. R.*, 145—298.

Judge must put his entire charge in writing, when so requested, and it is not reversible error to state the contentions of the parties orally, or to supplement it in slight omissions. *S. v. Khoury*, 149—457.

Judge's charge should be written when requested, and it is proper for him to read his notes of evidence in addition. *S. v. Dixon*, 149—462.

Proper for court to permit jurors to take his charge with them to jury room. *Gaither v. Carpenter*, 143—240.

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Discretion of.—Setting aside report of commissioners for indiscretion, supreme court will not reverse order. *Hawks v. Hall*, 139—179.

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In absence of gross abuse of discretion, granting or refusal of continuance is in discretion of trial judge and not reviewable. *S. v. Dewey*, 139—556.

See also *Lanier v. Ins. Co.*, 142—11.

Exceptions to language of counsel ordinarily in discretion of trial judge, and this court will not review his discretion unless impropriety of counsel was gross. *S. v. Horner*, 139—603.

See also *S. v. Carrawan*, 142—575.

Denial, without reasons, of motion to make additional party defendant, a proper but not necessary one, not reviewable. *Alken v. Mfg. Co.*, 141—339.

Upon motion for judgment by default, court in its discretion may allow answer or demurrer. *Morgan v. Harris*, 141—358.

Objection to comments of counsel is in discretion of trial judge and his action not reviewable unless for gross abuse of discretion and appellant probably suffered thereby. *Smith v. R. R.*, 142—21.

Amendment of complaint is in sound discretion of court and not reviewable. *Joyner v. Early*, 139—49.

Trial judge has no power to reduce a verdict without consent of party in whose favor it was rendered. *Isley v. Bridge Co.*, 143—51.

Judge may order clerk to desist from further action in supplementary proceeding, where similar one was then pending before him. *Ledford v. Emerson*, 143—527.

It is in discretion of trial judge to grant or refuse mistrial and continuance, and action not reviewable. *S. v. Hunter*, 143—607.

A juror, in discretion of court, may ask a competent question of a witness then on the stand. *S. v. Kendall*, 143—659.

Submission of additional issues after argument to jury on other issues, is discretionary with court. *Streator v. Streator*, 145—338.

Superior court has ample powers in all questions of practice and procedure, both as to amendments and continuances, and exercise of

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its discretion is not appealable. *Bernhardt v. Dutton*, 146—208.

Recalling witness for further examination is in discretion of court. *In re Abee*, 146—274.

While the trial judge in his discretion may set aside finding upon an issue as inadequate, he can not entirely disregard the issue. *Brady v. Elliott*, 146—583.

Refusal of motion to amend complaint is discretionary with judge, and exercise of his discretion is not reviewable. *Coleman v. Coleman*, 148—302.

Under certain conditions motion to docket appeal from justice's judgment may be allowed nunc pro tunc, but where appellant has neither paid clerk's fees nor requested him to docket appeal, nor paid any attention to it for eleven months, during which five terms of court have passed, refusal of judge to allow appeal to be docketed is not reviewable. *McClintock v. Ins. Co.*, 149—36.

While every issuable controverted fact, as distinguished from mere evidentiary facts, must be found by the jury upon appropriate issues, it is equally true, to a large extent, that the form of the issues is within the sound judicial discretion of court. *Rich v. Morisey*, 149—41.

Refusal to set aside verdict awarding excessive damages will not be reviewed unless there appears to be a gross abuse of discretion. *Freeman v. Bell*, 150—149.

Supreme court will not interfere with judge's refusal to set aside verdict as being against weight of evidence, except in gross abuse of discretion apparent in record. *Moore v. Lbr. Co.*, 150—264.

Refusal of judge to permit answers to be filed, in his discretion, is not reviewable, when discretion is not abused. *Clark v. Machine Co.*, 150—375.

Proceedings of court of record are in fieri—under absolute control of judge, subject to be modified or amended at any time before expiration of term in which they are had or done. *Cook v. Tel. Co.*, 150—429.

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Findings of.—In habeas corpus proceeding, judge should find material facts in evidence upon which his judgment is based. *Newsome v. Bunch*, 142—19.

Findings of fact by judge, when authorized by law or consent of parties, conclusive if there is any evidence. *Matthews v. Fry*, 143—384.

Judge's findings of fact, supported by evidence, will not be disturbed. *R. R. v. R. R.*, 148—76.

Judge should find the facts upon motion to set aside judgment for excusable mistake or neglect. *Smith v. Holmes*, 148—211.

Improper conduct.—New trial will not be granted when action of trial judge, if erroneous, could, by no possibility, injure appellant. *S. v. Hodge*, 142—685.

Juries should not only find the facts, but should draw their conclusions uninfluenced by acts or language of court, and language of charge "if you believe the evidence, defendant is guilty, and you will return a verdict of guilty," is improper, though standing alone, not reversible error. *S. v. Simmons*, 143—614.

It is reversible error for judge to charge jury that authorities argued by counsel to jury, under the statute, were directly against his position. *Perry v. Perry*, 144—328.

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Generally.—Judgment is an estoppel as to issues raised by pleadings which could be determined in that action. *Bunker v. Bunker*, 140—18.

Trial court can not ordinarily tax costs of action in favor of either party unless there is a judgment, costs being an incident of judgment. *Williams v. Hughes*, 139—16.

Judgment in ejectment, how prepared. *Crawford v. Masters*, 140—205.

Court has jurisdiction to adjudge against nonresident defendant only to extent of property seized. *May v. Getty*, 140—311.

To derive benefit in any court

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from former judgment, it must be specially pleaded. *Smith v. Lbr. Co.*, 140—375.

One can recover, if at all, only according to allegations of complaint. *Millhisser v. Leatherwood*, 140—238.

A judicial determination of issues in one action is bar to subsequent and similar one, although form and relief sought in latter different from former. *Lbr. Co. v. Lbr. Co.*, 140—437.

Where insolvent co-surety executes note and mortgage for his pro rata part of principal's debt, note and interest measure of recovery, though note given for less than true pro rata. *Chadbourn v. Durham*, 140—502.

Infant without general guardian may appear by next friend, and judgment rendered in such proceeding, otherwise valid, is binding upon their rights. *Settle v. Settle*, 141—553.

In courts of general jurisdiction, regularity of judgments and jurisdiction presumed, and recitals of such facts are conclusive when collaterally attacked. *Ibid*, 141—553.

Recital in decree that "defendants were duly served," when owners of land subject to dower, were not made parties, has no effect. *Card v. Finch*, 142—140.

Innocent purchaser will be protected where judgment regular upon its face recites service of process. *Hatcher v. Falson*, 142—364.

Assignee of judgment has right to rely upon recital in judgment of service of summons, and other matters pertaining thereto. *Ibid*, 142—365.

Where notice to show cause why judgment should not be revived is served, failure to defend gives revived judgment no more efficacy than original possessed. *Ibid*, 142—364.

Defendant is bound to take notice of such orders and decrees as were made in orderly course of legal procedure in term time. *Roberts v. Roberts*, 143—311.

Judgment is proper if it contain

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an appropriate relief in accordance with allegation and verdict, though not named in relief prayed for in complaint. *Davis v. Smith*, 144—297.

When issues are answered one way, and jury hand judge a paper stating their reasons for finding as they had, which was contradictory to the verdict, no judgment can be based upon it. *Smith v. Moore*, 145—271.

Where divorce decree entered by competent court having jurisdiction, plaintiff estopped from setting up defenses passed upon. *Bidwell v. Bidwell*, 139—402.

Divorce decree obtained in state of plaintiff's domicile, personal service upon defendant within jurisdiction, valid both in rem and personam. *Ibid*, 139—402.

Whether a decree is considered as a contract, it should be so construed as to give effect to each and every part of it, and bring all the different parts into harmony. *Lamb v. Major*, 146—533.

Where there was a general appearance by counsel for all defendants and answer filed, judgment can not be attacked collaterally, even if attorney had no authority to act, and though some were infants. *Rackley v. Roberts*, 147—207.

Final order in cause, in which rights are determined, should be made in the county at term of court, and generally a motion in cause other than for ancillary remedy should be made there. *Bank v. Perego*, 147—297.

Action cannot be brought on justice's judgment docketed in superior court, for that is a judgment only for purpose of lien and execution. When it becomes necessary to sue upon judgment, action must be brought upon judgment of the justice. *Oldham v. Rieger*, 148—550.

Where it appears upon face of record that certain persons in interest were not made parties, or that they appeared voluntarily, they are not bound by judgment. *Moore v. Lbr. Co.*, 150—263.

Judgment against one co-princi-

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pal proper where jury found note was valid debt of his, but fraudulent as to other principal. *Booker v. Eller*, 150—556.

Affirmed.—Where members of court are equally divided in opinion, judgment of court below will be affirmed. *Gattis v. Kilgo*, 140—109.

Assigned.—If a surety, against whom and his principal a judgment has been rendered, and which he has paid, intends to keep it in force, he must have it assigned to a stranger for his benefit, and not canceled. *Bank v. Hotel Co.*, 147—598.

Where assignee of judgment knows that service has not been made on debtor, statute of limitations begins to run in favor of assignor of judgment and this action is barred after three years. *Mfg. Co. v. Fertilizer Co.*, 150—418.

As a general rule, there is an implied warranty on part of assignor of judgment that it is a valid subsisting obligation against debtor for amount specified, and has not been paid, in whole or in part. *Ibid*, 150—418.

Confessed.—Not essential that confession of judgment state that controversy is real and proceedings in good faith. *Martin v. Briscoe*, 143—353.

Affidavit and statement of facts in this confession of judgment, sufficient. *Ibid*, 143—353.

Consent.—Consent decree, one put by parties on file with sanction of court. *Bunn v. Braswell*, 139—138.

Consent decree, what is not. *Bidwell v. Bidwell*, 139—402.

Consent judgment in vacation is valid, though agreement by counsel in open court not in writing or on minutes, if not denied. *Westhall v. Hoyle*, 141—337.

Recital in decree of confirmation, "by consent of all parties," a tenant in common who has taken benefits under the decree is bound by its recital. *Pittinger, Ex Parte*, 142—85.

Party to action is bound by judg-

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ment regularly entered dismissing it, but not by terms of agreement to which he was not a party, and as to latter it is not *res adjudicata*. *Shakespeare v. Land Co.*, 144—517.

Corrected.—Motion to correct judgment of superior court can not be made in supreme court, where upon appeal that court has heard and determined the case. *Moseley v. Johnson*, 144—277.

Where entry of decision by supreme court is incorrectly made, court may proceed *ex mero motu* to correct it, but it is best to do so upon notice first served on party to be affected by the amendment. *Durham v. Cotton Mills*, 144—715.

When appeal has been decided, supreme court has no power to modify decree after its opinion has been certified down. *Nelson v. Hunter*, 145—335.

Default.—Upon motion for judgment by default, court in its discretion may allow answer or demurrer. *Morgan v. Harris*, 141—358.

Defendant not entitled to judgment by default on his counterclaim where, pursuant to leave of court, formal denial was entered. *Tillinghast v. Cotton Mills*, 143—268.

Upon appeal from order setting aside judgment by default and inquiry for excusable neglect, judge decides whether there was excusable neglect or not and facts found by him are conclusive, and appeal lies from his conclusion. *Stockton v. Mining Co.*, 144—596.

Judgment by default final admits allegations of complaint, but judgment by default and inquiry admits only a cause of action and carries only nominal damages and costs, burden of proving right to recover any further judgment being still upon plaintiff. *Ibid*, 144—596.

In setting aside judgment by default and inquiry for excusable neglect, judge should find that defendant has *prima facie* a meritorious defense. *Ibid*, 144—596.

Answer that defendant "has no knowledge or information sufficient

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to form a belief as to the truthfulness thereof; therefore denies the same," is insufficient denial of matters alleged to be in personal knowledge of defendant, and judgment on that allegation for want of denial was proper. *Streator v. Streator*, 145—338.

Where plaintiff fails to deny counterclaim, court may refuse motion for judgment thereon and allow reply to be filed at any time. *Bernhardt v. Dutton*, 146—207.

When judgment by default final is allowed for defect amounting only to an irregularity, it is not set aside as matter of right, but in sound discretion. A substantial right must have been prejudiced and one must proceed within reasonable time. *Cowan v. Cunningham*, 146—454.

Docketed.—The docketing of a justice's judgment in the superior court becomes a judgment of that court only for purpose of creating a lien and having execution issued thereon, and an action brought on such judgment must be commenced within period limited on judgments of that court. *Oldham v. Rieger*, 148—550.

Action can not be brought on justice's judgment docketed in superior court, for that is a judgment only for purpose of lien and execution. When it becomes necessary to sue upon the judgment, action must be brought upon judgment of the justice. *Ibid*, 148—550.

Dormant.—Where motion to revive dormant judgment is before judge, on appeal, he may reverse the clerk and remand to him with directions how to proceed, or he may grant order to revive and direct issue of execution. *Martin v. Briscoe*, 143—353.

Upon motion to revive dormant judgment, defendant can not show that no service of process had been originally made upon him. *Smathers v. Sprouse*, 144—637.

Filling up an execution blank, but never actually sending it out of the clerk's office is not sufficient to prevent judgment from becoming

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dormant. *McKeithen v. Blue*, 149—98.

Failure of clerk to notify defendant of issue of execution upon dormant judgment is at most an irregularity, and if officers had sold excess, without objection, stranger purchasing without notice would have acquired title. *Ibid*, 149—98.

Erroneous.—Recovery against surety can not exceed amount of bond. *Bernhardt v. Dutton*, 146—209.

In action by husband and wife on delayed death message sent to husband, fact that wife was sister of decedent will not entitle her to judgment in absence of evidence and finding that message was sent to wife, or for her benefit. *Holler v. Tel. Co.*, 149—341.

Final.—Where final judgment rendered, no exception or appeal taken, amount recovered and costs paid, vitality of suit and judgment spent and can not be reopened. *Bunker v. Bunker*, 140—18.

Judgment final, when. *Ibid*, 140—18.

Judgment may be final in part and interlocutory in part. *Williams v. McFadyen*, 145—159.

Statute of limitations applies to final, and not interlocutory judgments. *Ibid*, 145—158.

Foreign.—In action upon judgment of sister state, defendant may set up fraud and such equitable defense may be made in justice's court. *Levin v. Gladstein*, 142—482.

In action on judgment of another state, plea of *nihil debet* not available, but lack of jurisdiction of person or subject matter is. *Ibid*, 142—485.

Impeached.—Decree of court having jurisdiction in a proceeding, in all respects regular on its face as to parties, can not be attacked collaterally. It may be successfully impeached for fraud in independent action brought for the purpose, when sufficient allegations of fraud are made and issues framed upon such allegations are submitted to a jury and fraud is established by the verdict. *Hargrove v. Wilson*, 148—441.

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Where final judgment is assailed for fraud aliunde, direct proceeding is by action, and if its validity is embraced within scope and purpose of action and issue is raised by pleadings germane to relief demanded, the proceeding does not cease to be direct because other issues may be involved. *Houser v. Bonsal*, 149—58.

Final judgment can be attacked for fraud in its procurement only by independent action. *Lanier v. Hellig*, 149—387.

Interlocutory.—Appeal will not lie from interlocutory order in action to recover interests in timber, determinative only, under agreement of counsel, of question of title, leaving objections and exceptions as to damages open for future determination. *Moore v. Lbr. Co.*, 150—263.

Irregular.—Court will not set aside irregular judgment where there has been long delay or unexplained laches, especially where rights of third parties have intervened. *Hatcher v. Faison*, 142—364.

Special proceeding can not be assailed by an independent action for mere irregularity. Plaintiff should have proceeded by motion in the cause to set aside judgment as to her. *Rackley v. Roberts*, 147—204.

To set aside judgment for irregularity, for lack of proper service of summons, court should find facts and correct the record to speak the truth, and if there was no service or appearance by defendant, judgment is void. *Simmons v. Box Co.*, 148—345.

If partition sale was made pursuant to irregular judgment, and is for that reason to be set aside, court would be compelled to administer the equities growing out of the transaction, subrogating purchasers to rights of creditors, and this would necessitate having all of them before the court. *Lanier v. Hellig*, 149—387.

Justice's.—Justice's judgment against married woman, valid when. *McAfee v. Gregg*, 140—448.

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Upon judgment given by magistrate in absence of party, affidavit to open and rehear case must be made in ten days after rendition of judgment. *Bullard v. Edwards*, 140—644.

Magistrate made *ex parte* order for rehearing, upon affidavit served after ten days from rendition of judgment, plaintiff waives no rights by asking continuance. *Ibid*, 140—644.

Judgment rendered upon summons wrongfully issued to another county is void and may be collaterally attacked. *Rutherford v. Ray*, 147—253.

Justice acquires no jurisdiction of married woman served with process in wrong county, and judgment by default, execution and sale of her property in his county conveys no title to purchaser. *Ibid*, 147—257.

Lien of.—Interest of husband in land conveyed to him and his wife, is not subject to execution during their joint lives. *Hood v. Mercer*, 150—700.

Out of term.—Upon agreement empowering judge to sign judgment "out of term," he may not hear and pass upon motion to set verdict aside. *Knowles v. Savage*, 140—372.

Judge may hear motions and enter judgments out of term and in another county by consent. *Hicks v. King*, 150—375.

Set aside.—Setting aside judgment in discretion, not reviewable. *Slocumb v. Const. Co.*, 142—350.

Where one's title will be affected if decree is set aside, he will not be heard upon this motion if not party to action. *Johnson v. Johnson*, 142—462.

Courts of equity will set aside judgments of their own and other states for fraud practiced in procuring them. *Levin v. Gladstein*, 142—489.

Discretionary with judge to set aside verdict for excessive damages, and this is not reviewable. *Boney v. R. R.*, 145—250.

Reason of judge for setting aside

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verdict, if insufficient, is immaterial, if there is a valid reason in record to sustain his ruling. *Metal Co. v. R. R.*, 145—296.

Independent action lies to set aside judgment in a former proceeding or in a civil action upon ground of fraud, or when it involves some other equitable element, when relief can only be had in that way. *Rackley v. Roberts*, 147—206.

Parties moving to set aside an order for irregularity, under *Revisal*, 2842, must set out their defense. *Bank v. Hotel Co.*, 147—602.

When there was no service of process, judgment can be set aside by motion in the cause. *Simmons v. Box Co.*, 148—345.

Where proceeding appears to be in all respects regular and plaintiffs appear on its face to be parties to it, they are apparently bound by it. If they were made parties without their knowledge or consent, and have not ratified or consented to decree, it may be set aside by motion in cause. *Hargrove v. Wilson*, 148—441.

Strangers to.—Owner of mule is not bound by judgment in action between third party and one attempting to mortgage mule to him, when he was not a party thereto. *Graves v. Jackson*, 150—385.

Supreme court.—Where judgment affirmed, and date of its execution has passed, final judgment will be entered in supreme court. *Corporation Commission v. R. R.*, 140—244.

Tender.—When judgment is tendered before trial or verdict, costs incurred after tender can not be recovered. *Phillips v. Little*, 147—283.

No law permits tender of judgment for nominal damages as aid to defective demurrer. *Hall v. Tel. Co.*, 139—369.

Transcript.—By docketing transcript of judgment in superior court a lien upon land is acquired, yet for protection of purchasers under execution sale jurisdictional facts should be made to appear upon the transcript. *Rutherford v. Ray*, 147—259.

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Void.—Judgment rendered against one, not a party, affecting vested rights, is void. *Card v. Finch*, 142—140.

Decree of divorce where neither party resides in State of forum, and court has no jurisdiction of subject matter, void. *Bidwell v. Bidwell*, 139—402.

Void judgment may be regarded as a nullity and attacked whenever it may come in question, but it must affirmatively appear upon the judgment record that it is void. *Smathers v. Sprouse*, 144—638.

Where process is served on one having same name as defendant, but real defendant in fact is not served and enters no appearance, judgment against him is void. *Flowers v. King*, 145—235.

When judgment is void for entire lack of jurisdiction, defendant may have it set aside whenever such fact is made to appear, without proof of merits. *Ibid*, 145—235.

When defective decree is referred to in a valid one at a subsequent term of court having jurisdiction of parties, former decree is rendered valid. *Hicks v. King*, 150—376.

Judicial Notice.

See Evidence, judicial notice.

Judicial Sales.

See Sales, judicial.

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Decree of divorce where neither party resides in State of forum, and court has no jurisdiction of subject matter, void. *Bidwell v. Bidwell*, 139—402.

Where divorce decree entered by competent court having jurisdiction, plaintiff estopped from setting up defenses passed upon. *Ibid*, 139—402.

Power over person of garnishee confers jurisdiction on court of the State where writ issued against him, without regard to "situated or debt." *Wright v. R. R.*, 141—164.

Where foreign court had jurisdiction of subject matter and parties,

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this court, in absence of countervailing evidence, presumes that it proceeded regularly. *Ibid*, 141—164.

In action on judgment of another State, plea of nil debet not available, but lack of jurisdiction of person or subject matter is. *Levin v. Gladstein*, 142—485.

Legal existence of a court can not be drawn in question by plea to jurisdiction. *S. v. Hall*, 142—710.

Agreement between counsel for time to file answer is acceptance of jurisdiction and waiver of right to remove. *Garrett v. Bear*, 144—23.

Amount demanded in good faith and on facts alleged in complaint as a whole, which reasonably tend to support it, fixes jurisdiction, and this can not be restricted by defendant to his own point of view by irregular and defective pleading. *Thompson v. Express Co.*, 144—389.

When action can be brought either in tort, for wrongful conversion, or upon contract, the courts in favor of jurisdiction, will sustain the election of plaintiff. *White v. Eley*, 145—36.

Plaintiff is not estopped to bring another action in superior court against same defendant upon same subject matter, where he was dismissed by magistrate for want of jurisdiction. *Brick v. R. R.*, 145—203.

Different methods of acquiring jurisdiction of a cause and parties, stated. *Vick v. Flournoy*, 147—212.

Where husband and wife are sued in a justice's court of a county other than their own, judgment by default entered and land sold under execution, purchaser acquired no title. *Rutherford v. Ray*, 147—259.

Jurisdiction is a constitutional question and may not be waived. May be raised for first time in supreme court, and is fixed by amount for which in aspect most favorable for plaintiff judgment could be rendered upon facts set out. *Realty Co. v. Corpening*, 147—614.

After petition and bond for removal are filed, jurisdiction of State court ceases eo instanti and it can

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make no order except that further proceedings be suspended, nor can plaintiff submit to nonsuit. *McCulloch v. R. R.*, 149—310.

It is the "demand" what the plaintiff could recover on face of summons if there is no defense, which determines jurisdiction. *Riddle v. Mining Co.*, 150—690.

Clerk.—Where clerk had directed execution to issue as provided in Revisal 2842, he had no discretion to revoke his order. *Bank v. Hotel Co.*, 147—602.

Equity.—A court of equity will not undertake to construe a will where rights involved have not come in question, for rights of devisees are purely legal and they must be adjudged when a cause of action arises. *Hepinstall v. Newsome*, 146—504.

Advisory jurisdiction of equity court is primarily confined to trusts and trustees, which include executors, as far as their rights, powers and duties under will are concerned. *Ibid.*, 146—504.

Equity will correct a deed to effectuate intention of parties, when it appears, from construction of entire instrument and from action of parties, that there has been a mistake as matter of law. *Condor v. Secrest*, 149—204.

Courts of equity have jurisdiction in matters of construction of wills involving administration of trusts, and when devises and legacies are dependent on each other as to make it necessary, it will construe whole will to determine rights of beneficiaries. *Haywood v. Trust Co.*, 149—216.

Justices.—Where title of plaintiff denied in action for rent before justice, action properly dismissed. *Hudson v. Hodge*, 139—308.

Owner of equitable title in crops may sue in justice's court. *Walker v. Miller*, 139—448.

Magistrate has jurisdiction of action for injury to personal property where damage does not exceed \$50. *Watson v. Farmer*, 142—452.

Justice may render judgment for

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balance due on note given for purchase money of land. *McPeters v. English*, 141—491.

Justice has jurisdiction of action on note for \$75 for purchase money on land. *Davis v. Evans*, 142—464.

Jurisdiction of justice not measured by value of property, but amount demanded in warrant or complaint. *Duckworth v. Mull*, 143—465.

Where landlord guaranteed payment for horse sold to tenant upon condition that he was sound, and before trade was made and without his knowledge, landlord was induced to give his note for \$155, justice has jurisdiction of action to cancel note. *Manning v. Fountain*, 147—18.

For feme plaintiff to collaterally attack judgment of a justice in another action, in which she was a defendant, her coverture must have appeared on face of record. *Rutherford v. Ray*, 147—257.

Magistrate acquires no jurisdiction of person served with process in wrong county by virtue of lien filed on his land in county in which justice resides, upon ground that proceedings are quasi in rem. *Ibid.*, 147—259.

Magistrate has no jurisdiction to declare an equity or to enforce an equitable lien, but he may enforce collection of money which equitably belongs to a party. *Fidelity Co. v. Grocery Co.*, 147—513.

When demand arose out of tort, it may be waived and suit had on contract so as to be in justice's jurisdiction. *Stroud v. Ins. Co.*, 148—56.

"Sum demanded" in summons is test of justice's jurisdiction. *Teal v. Templeton*, 149—33.

On appeal from justice's judgment, when amount involved is doubtful, it may be made clear by a remitter sufficient to confer jurisdiction, even if remitter is retroactive. *Ibid.*, 149—34.

Justice has jurisdiction of lease for three years or less, and where title to land is not drawn in controversy. *Ibid.*, 149—34.

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Justice has jurisdiction concurrent with that of superior court of all actions of tort, wherein amount demanded for plaintiff's injury did not exceed fifty dollars; "property in controversy," meaning "value of injury complained of and involved in litigation." *Houser v. Bonsal*, 149—53.

Revisal 1447 seems to make the question of the right to serve process on defendant outside of county of justice, to depend somewhat upon good faith of plaintiff in joining defendants as parties, and in certain cases it may be so plain that plaintiff has no real or bona fide claim against defendant who is a resident of the county in which suit is pending, that question of misjoinder may be presented as one of law. *Marler Co. v. Clothing Co.*, 150—522.

Demand for interest on a greater sum than \$200 defeats jurisdiction of justice. *Riddle v. Milling Co.*, 150—690.

Superior court.—Action to establish lost deed, record of which was destroyed, may be brought before clerk, or in superior court. *Jones v. Ballou*, 139—526.

Action for \$57 damages for breach of covenant in deed, within jurisdiction of superior court. *Brown v. Southerland*, 142—225.

Superior court has jurisdiction to finally determine all controversy between parties in administrations. *Olham v. Rieger*, 145—257.

Summary proceeding in ejectment is restricted to cases specified in the act, and where the relation of mortgagor and mortgagee, giving right to account, or vendor and vendee, requiring adjustment of equities, justice has no jurisdiction. *Hauser v. Morrison*, 146—249.

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Jurors cannot be heard to impeach their verdict. *Coxe v. Singleton*, 139—361.

See also: *Muse v. R. R.*, 149—452.

Court should call on counsel to

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state what he expects to prove, or let jury retire, where question objected to and it cannot be seen why it is incompetent. *Hicks v. Hicks*, 142—231.

Exemption from jury duty by virtue of services in fire company, for 5 years, as prescribed in charter, may be revoked by Legislature any time. *State v. Cantwell*, 142—604.

In action upon delayed message, jury have no right to take into consideration their own feelings. *Shepard v. Tel. Co.*, 143—244.

A juror, in discretion of court, may ask a competent question of a witness then on the stand. *State v. Kendall*, 143—659.

Appeal provided by Revisal 2587, from judgment of clerk in condemnation proceedings, under Revisal 2580, takes entire record up for review, and neither party is entitled to jury trial in term before report of jury has been made and confirmed. *R. R. v. R. R.*, 148—64.

Revisal 1957 to 1960, relative to revision of jury list, are directory only, and while they should be observed, failure to do so does not vitiate venire, in absence of bad faith or corruption on part of commissioners. *State v. Banner*, 149—521.

Challenge.—One not in position to except to objection to juror, where he had not exhausted his peremptory challenges. *Ives v. R. R.*, 142—131.

See also: *State v. Bohannon*, 142—695.

Juror eligible to serve if he owns no land, but wife owns land in fee and has children by him. *Hodgin v. R. R.*, 143—93.

Where challenge for cause by defendant was erroneously allowed, exception thereto cannot avail the plaintiff, as he did not exhaust his peremptory challenges. *Ibid*, 143—93.

While it is irregular for one to be both plaintiff and defendant in same action, and as defendant challenged a juror passed by the plain-

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tiff's over objection of his co-defendants, it is harmless error when defendants peremptory challenges were not exhausted. *Medlin v. Simpson*, 144—397.

Challenge to the array, what is not. *State v. Walker*, 145—567.

Finding that a juror is indifferent is a matter in discretion of trial judge, and not reversible in supreme court. *State v. Banner*, 149—522.

One has a right to object to jurors, not to select them. *Ibid*, 149—523.

An employe is an incompetent juror for trial of a cause involving rights or interests of employer, but where juror was peremptorily challenged by plaintiff, and his rights do not appear to have been prejudiced, there is no error. *Blevins v. Cotton Mills*, 150—497.

Competency of.—An employe is an incompetent juror for trial of a cause involving rights or interests of employer, but where juror was peremptorily challenged by plaintiff, and his rights do not appear to have been prejudiced, there is no error. *Blevins v. Cotton Mills*, 150—497.

Stockholder in plaintiff bank not a competent juror in this case. *Bank v. Oil Mills*, 150—684.

Common knowledge of.—Where destination of shipment is but twenty-five miles, on main line of road, jury may determine what is ordinary time for shipment from their common experience. *Rollins v. R. R.*, 146—157.

In action for penalty for delayed shipment, there being no evidence as to "ordinary time required," jury may say from their common knowledge and experience whether thirty-five days to ship less than 200 miles was reasonable time. *Jenkins v. R. R.*, 146—180.

Exhibiting papers to.—Proper for court to permit jurors to take his charge with them to jury room. *Gaither v. Carpenter*, 143—240.

Where charge of court was taken by jury to their room, but by over-

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sight special prayers asked by appellant and given, were not handed to jury, and his counsel present in court did not then, or before verdict, call this to court's attention, no error. *Ibid*, 143—240.

In action upon note, alleged by defendant's administrator to be a forgery, where non-expert has testified that he noticed a difference in signature to note and certain papers in genuine handwriting, competent for him to show the difference in writing to jury. *Martin v. Knight*, 147—579.

Questions for.—Where there is any evidence that reasonably tends to prove fact in issue, it is for jury. *Smith v. Lumber Co.*, 140—375.

See, also, *Metal Co. v. R. R.*, 145—297; *Currie v. Gilchrist*, 147—656.

"No evidence to go to jury," what is meant. *Campbell v. Everhart*, 139—502.

Evidence which raises a conjecture is insufficient and should not be submitted to jury. *Kearns v. R. R.*, 139—472.

Deed obtained from illiterate man by fraud, proper case for jury. *Hodge v. Hudson*, 139—358.

Evidence of agency for jury. *Jackson v. Tel. Co.*, 139—347.

Reasonableness and necessity of order of Corporation Commission, question for jury. *Corporation Commission v. R. R.*, 139—126.

When facts are few, simple and undisputed, reasonable time is question for jury. *Claus v. Lee*, 140—552.

Whether or not language used in connection with sale of personal property constitutes a warranty, jury may consider testimony in light of language used, spirit in which parties met, etc. *Beasley v. Surles*, 140—605.

Error for court to decide as matter of law that delay in delivery of telegram seventeen minutes after receipt, was unreasonable. *Kernodle v. Tel. Co.*, 141—436.

In action on delayed message, what plaintiff would have done had it been promptly delivered, question for jury. *Ibid*, 141—437.

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Except in clear cases, question whether intervening act and resultant injury were such as should have been expected, is for jury. *Harton v. Tel. Co.*, 141—456.

Question for court to decide what was boundary; and for jury where it is. *Gudger v. White*, 141—508.

If facts proved establish the more reasonable probability that defendant has been guilty of actionable negligence, case must be submitted to jury, though possibility of accident may arise on the evidence. *Fitzgerald v. R. R.*, 141—530.

Whether upper proprietor is exercising reasonable use of stream, question for jury. *Durham v. Cotton Mills*, 141—615.

Whether purchase money secured by unregistered bond for title has been paid, as against holder of registered deed, is for jury. *McNeill v. Allen*, 146—285.

Where defendant recommended to shippers the use of tenpenny nails in securing standards on flat cars, use of eightpenny nails, as evidence of negligence, is for jury. *Wallace v. R. R.*, 141—647.

Where act is not clearly within scope of servants employ, but evidence tends to establish that fact, question for jury whether or not tortious act was authorized. *Sawyer v. R. R.*, 142—1.

It is not for court to draw inference that officers of a city had actual knowledge of defect in bridges because of length of time it had continued. This is for jury. *Brewster v. Elizabeth City*, 142—10.

Action for delayed delivery of message stating wife's illness, husband's delay in reaching her and mental anguish in consequence, should be submitted to jury. *Gerrock v. Tel. Co.*, 142—22.

Question for jury whether one placed himself in place of obvious danger in standing behind bed-plate of machine as it stood on edge, and directing battering-ram propelled against it from other side. *Shaw v. Mfg. Co.*, 143—131.

Direct evidence of negligence not required, but same may be inferred

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from acts and circumstances, and if facts proved establish more reasonable probability that defendant has been guilty of actionable negligence, case should be submitted to jury. *Bird v. Leather Co.*, 143—283.

When private act provides for laying out cartway by commissioners, upon "sufficient reason" shown, question is for jury. *Cook v. Vickers*, 144—312.

In action for injuries sustained by driver of team over road upon which stumps had been left standing, question of negligence should be referred to jury to be determined under rule of prudent man. *Bradley v. R. R.*, 144—558.

Where owner of land sought to be established as a public alley, moved back his fence for public convenience; abutting owner made improvements indicating it; alley was used by public in passing and working it with grantor's knowledge, evidence is for jury as to dedication and acceptance. *Tise v. Whitaker*, 146—377.

In action upon delayed shipment, question as to delay and amount plaintiff entitled to recover, is for jury. *Ice Co. v. R. R.*, 147—68.

In action for penalty for delayed shipment, jury should pass on question of delay and amount of recovery, under proper instructions, instead of directing verdict for plaintiff, if evidence was believed. *Ice Co. v. R. R.*, 147—62.

In action on delayed shipment, jury should find whether there has been a delay; if so, how long, and what plaintiff is entitled to receive for it. *Davis v. R. R.*, 147—72.

Where intestate run over by train at night, while lying unconscious upon track, straight for 100 yards, properly submitted to jury. *Plemmons v. R. R.*, 140—286.

In action to correct a deed, if there is more than a scintilla of evidence, it is for the jury to say whether evidence was clear, cogent and convincing. *Cuthbertson v. Morgan*, 149—76.

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If there is any evidence tending to show that death of intestate was the result of negligence of defendant, it should have been submitted to jury. *Thompson v. R. R.*, 149—156.

Whether one exceeded the privilege and was actuated by malice are originally questions for the jury. *Gattis v. Kilgo*, 140—108.

Province of.—When evidence is conflicting as to amount of damages to timber caused by defendant's negligence, proper to charge that jury should not be controlled in their verdict by opinion of witnesses, but they should apply their own common sense, "so far as affected by your experience." *Hamilton v. R. R.*, 150—194.

Waiver of trial by.—When one desires to reserve his right to jury trial, it should be expressly claimed when order for compulsory reference is made. The exceptions must be definite and present distinctly each finding of fact by referee to which exception is taken. *Ogden v. Land Co.*, 146—446.

Jury trial cannot be had when no exception was noted at time to order of reference. *Bruce v. Mining Co.*, 147—644.

JUSTICE OF THE PEACE.

One may hold office of recorder and justice of the peace at same time. *State v. Lord*, 145—480.

Pleadings before.—Pleadings in justice's court, practice. *Smith v. Newberry*, 140—385.

Laborer.

See Lien, subcontractor.

Laches.

See Statutes of Limitations; Excusable Neglect; Appeal.

LANDLORD AND TENANT.

Generally.—Where plaintiff leased a storeroom, steam-heated and ready for occupancy by certain day, and heat was not turned on for

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several days thereafter, defendant was not required to take store. *Lodge v. Smith*, 147—245.

When landlord and tenant have adequate remedy by claim and delivery but do not resort to it, they may bring action in superior court (Rev. 1995) to determine any matters in controversy between them. *Talbot v. Tyson*, 147—275.

In absence of express provision in lease, lessor impliedly covenants with lessee that the premises shall be open to entry by lessee at time fixed for beginning of term. *Sloan v. Hart*, 150—273.

Assignment of lease.—Verbal assignment of unexpired lease of land, to run for more than three years, is void. *Alexander v. Morris*, 145—22.

Endorsement upon written assignment "we hereby transfer all our rights and title and interest in this lease," is sufficient. *Ibid*, 145—22.

One will be deemed to have abandoned his right to contract for sale of lease, the assignment of which was to be with written consent of owner, where he has never applied to owner for such consent. *Burns v. McFarland*, 146—383.

Where interest in lease has been sold to another, without notice of plaintiff's right, defendant could not be compelled to specifically perform his contract, as he could not convey title, and plaintiff's remedy is action for damages for breach of contract. *Ibid*, 146—383.

When a lease contains an agreement that lessee may purchase land during continuance of lease, assignment of lease conveys to and vests in assignee the same right. *Pearson v. Millard*, 150—310.

Lease.—Where lease gives tenant right to renew for a like term, or right to purchase during its continuance, his right terminates on day of expiration if he fails to renew. *Product Co. v. Dunn*, 142—471.

Covenant for renewal of lease is an incident of the lease and will pass by an assignment of unexpired

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term. *Barbee v. Greenberg*, 144—434.

Assignee of lease, with right to demand a renewal for his own benefit, can make such right available as a defense in action to recover possession, even in justice's court. *Ibid*, 144—430.

In a joint lease, notice of intention to renew must be given by all of lessees. *Ibid*, 144—435.

In absence of express provision in lease, lessor impliedly covenants with lessee that premises shall be open to entry by lessees at time fixed for beginning of term. *Sloan v. Hart*, 150—273.

Lease for five years without privity examination of wife, is void as to her. *Richardson v. Richardson*, 150—554.

Removal of fixtures.—Tenant has right to remove a window from house before he goes out, if it can be done without injury to freehold. *Critch v. Watson*, 146—152.

Rent.—Common law remedy of lessors by distress does not obtain in this state; and unless specially given by statute, landlord has no lien on product of leased property for rent. *Reynolds v. Taylor*, 144—167.

When one rents a store for mercantile purposes and land for agricultural purposes, under entire contract to pay \$40, and portion of crops to be raised on land as entire rent for store and land, without apportionment of any distinct part to be paid for store, and jury finds this fact, plaintiff has landlord's lien on all products grown on land until entire rent is paid. *Ibid*, 144—165.

Proper issues suggested where landlord claims lien, and intervenors claim agricultural lien upon question of entire contract. *Ibid*, 144—165.

Where life estate is granted in consideration of a pepper-corn rent, life tenant is entitled to rents during continuance of lease if jury found it to be valid. *Smith v. Moore*, 145—269.

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When one gets into possession of farming land, without a reserved rent, he is liable to action for assumpsit, for a reasonable amount, for use and occupation. *Sessoms v. Tayloe*, 148—372.

Where relation of landlord and tenant exists, but there is no evidence of the value or amount of rent, no part of crop can be held for rent. *Ibid*, 148—374.

Where one contracted to support his aunt, in consideration of a deed from her to him, reserving to her a life estate, nephew went into possession to make a crop, without a reserved rent, and he died that summer, his widow is entitled to year's support out of crop, and balance goes to his administrator to pay reasonable compensation for use of land. *Ibid*, 148—374.

When under agreement of lease of lands, containing also a contract to convey upon payment of stipulated rental for certain time, and lessor treats lease as continuing after default, he is entitled to lien for rent; but when he seeks to resume possession, lessee can assert his equity under contract to convey, cause land to be sold and pay balance of purchase money. *Hicks v. King*, 150—371.

Rents accrued from land in ejectment, how applied. *Card v. Finch*, 142—141.

Damages for loss of rents caused by contractor's fault, recoverable. *Donlan v. Surety Co.*, 139—212.

When one takes possession under another, he may not dispute latter's title till he gives up possession. *Campbell v. Everhart*, 139—502.

Where title of plaintiff denied in action for rent before justice, action properly dismissed. *Hudson v. Hodge*, 139—308.

Tenant holding over.—Implied covenant of lessor to put lessee in possession at time stated, does not extend beyond time when lease is to commence. If after time when lessee is entitled to possession, under terms of lease, a stranger trespass on or take possession of and

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hold leased premises, that is a wrong done to lessee, for which lessor cannot be held responsible. *Sloan v. Hart*, 150—274.

Entire damages arising from breach of implied covenant that leased premises should be open to entry of lessee at fixed future time, should be recovered in one and same action. *Ibid*, 150—274.

Upon failure of lessor to put lessee in possession, in breach of contract of lease, the injury immediately ensues, and cause of action arises without necessity of tender of rent by lessee. *Ibid*, 150—274.

Measure of damages for breach of implied covenant in lease, that lessee should be put in possession at future specified time, is difference between rent agreed upon and market value of the term, plus any special damages alleged and proved. *Ibid*, 150—275.

Title denied.—Where title of plaintiff denied in action for rent before justice, action properly dismissed. *Hudson v. Hodge*, 139—308.

When possession is wholly restored to him who gave it, estoppel of tenancy ceases. *Campbell v. Everhart*, 139—502.

When one takes possession under another, he may not dispute latter's title till he gives up possession. *Ibid*, 139—502.

Lappage.

See Deeds, lappage.

Law.

See Statutes; Conflict of Laws; Evidence; Judicial Notice.

Lawyer.

See Appearance; Attorneys.

LAW.

Questions of.—What is public way, always one of law. *Cozard v. Hardwood Co.*, 139—283.

LEGISLATURE.

LAWS.

What govern.—Where complaint avers contract made in Virginia, rights of parties determined by those laws, so far as same apply. *Hall v. Tel. Co.*, 139—369.

Law governing cases for breach of contract applies in awarding damages for mental anguish. *Dayvis v. Tel. Co.*, 139—78.

Growing timber part of realty; deeds and contracts concerning it governed by laws applicable to land. *Hawkins v. Lumber Co.*, 139—160.

Lease.

See Landlord and Tenant, lease; Sales, conditional.

Legacy.

See Wills, lapsed legacy; Executors and Administrators, ademption of legacy.

LEGISLATURE.

Acts of.—Acts of legislature presumed valid, and all doubts resolved in support of act. *Lowery v. School Trustees*, 140—33.

Power of.—Fishing and hunting rights in Albemarle and Pamlico Sounds, rest in state and subject to legislative control. *Daniels v. Homor*, 139—219.

Legislature has power either directly or through commission to supervise and regulate conduct of common carriers. *Corporation Com. v. R. R.*, 139—126.

Corporation Commission has power to require railroad to place scale tracks. *Ibid*, 139—126.

Legislature cannot deprive courts of inherent power to attach for contempt. *Ex parte McCown*, 139—95.

Legislature may give "penalties" either in whole or in part, to whomsoever shall sue for same, but statute giving to informant half of fine imposed, unconstitutional. *State v. Maulsby*, 139—503.

Legislature has complete power to regulate highways in the state

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and may prescribe what vehicles may be used on them. *State v. Holloman*, 139—643.

General Assembly may regulate fisheries on private property. *State v. Sutton*, 139—574.

Legislature can prescribe such terms as it thinks proper as prerequisite to ordering election. *Pace v. Raleigh*, 140—65.

Office of Register of Deeds is constitutional and legislature may change the duties and diminish the emoluments if public welfare requires. *Fortune v. Commissioners*, 140—323.

Legislature has plenary power over dispensaries in their creation, abolition and application of net proceeds. *Crocker v. Moore*, 140—429.

Act creating graded school district and authorizing trustees to levy tax and issue bonds when act approved by majority of qualified voters, valid exercise of legislative authority. *Smith v. School Trustees*, 141—143.

Act creating graded school district, including portions of two white and colored districts as established by board of education, valid though no new registration ordered for entire electorate of new district. *Ibid*, 141—143.

While office of sheriff is constitutional, regulation of fees is within control of legislature, and same may be reduced during term of incumbent. *Comrs. v. Stedman*, 141—448.

Authority to Corporation Commission to require railroads to construct and maintain union depot, is valid exercise of legislative power. *Dewey v. R. R.*, 142—392.

Exemption from jury duty by virtue of services in fire company, for five years, as prescribed in charter, may be revoked by legislature any time. *State v. Cantwell*, 142—604.

Legislative power can be restrained only by constitutional provisions and cannot be restricted by reference to common law. *Ibid*, 142—631.

LIBEL AND SLANDER.

Legislature has power to establish qualifications for one to become practising member of bar. In re Applicants for License, 143—1.

Counties, cities and towns are governmental agencies and subject to be changed or divided at will of legislature. *Jones v. Comrs.*, 143—60.

Legislature has power to authorize a railroad to cross and erect a bridge over a navigable stream. *Pedrick v. R. R.*, 143—486.

Legislatures of two states cannot by any joint legislation create one corporation having a domicile in each state. *Staton v. R. R.*, 144—149.

Bond issue by county to aid teachers training school is not for a private purpose, and legislature may authorize municipal corporations to apply their revenues and credit to legitimate purposes tending to the general good of the community, though every taxpayer may not be directly benefited thereby. *Cox v. Comrs.*, 146—586.

Legitimacy.

See Marriages, slave.

Letters.

See Evidence, letters; Executors and Administrators, letters.

Lex Loc.

See Conflict of Laws; Contracts, lex loci.

LIBEL AND SLANDER.

Generally.—Where plaintiff went to defendant's office for work and was told by an officer that it did not want him, and proceeded to insult plaintiff, defendant not responsible. *Sawyer v. R. R.*, 142—1.

Proof of good faith and lack of actual malice, and general bad character of plaintiff, competent in mitigation of damages for libel. *Logan v. Hodges*, 146—43.

Exemplary damages in libel and slander, proper, when act complained of was conceived in the

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spirit of mischief or of criminal indifference to civil obligations. *Ibid*, 146—44.

Joint action does not lie against two or more persons for words spoken, unless defendants are connected by allegation and proof of a common design and purpose. *Rice v. McAdams*, 149—30.

Neither spouse can sue other in tort for slander and libel. *State v. Fulton*, 149—489.

Justification.—Justification, if to be availed of as a defense, must be pleaded. *Logan v. Hodges*, 146—43.

Per se.—Writing a postal, in which robbery is charged against one, is actionable per se. *Logan v. Hodges*, 146—40.

Privilege.—Complaint against public official, to be privileged, should be made to one having jurisdiction to entertain it. *Logan v. Hodges*, 146—41.

Investigation of charges against president of college by its board of trustees was qualifiedly privileged, and so was publication of proceedings in pamphlet form, which was intended for circulation among patrons of college and those likely to become its patrons. *Gattis v. Kilgo*, 140—107.

Any statement or communication is conditionally privileged when made bona fide about something in which (1) the speaker has an interest or duty; (2) the hearer has a corresponding interest or duty; and (3) when the statement or communication is made in protection of that interest or in performance of that duty. *Ibid*, 140—107.

Effect of the privilege is to cast upon plaintiff the burden of showing malice on defendant's part in uttering or publishing alleged slanderous words. If one exceeds the privilege, the ordinary rules of liability apply. *Ibid*, 140—107.

Whether one exceeds the privilege and was actuated by malice are ordinarily questions for the jury. *Ibid*, 140—108.

Proceedings before school boards,

LIENS.

religious, fraternal and like organizations are only qualifiedly privileged and are protected by such privilege when properly used and not abused. *Ibid*, 140—108.

Publication.—Telegrams and postal cards containing defamatory matter, transmitted in the usual manner, will be a publication. *Logan v. Hodges*, 146—40.

License.

See Register of Deeds, issue of license; Intoxicating Liquors, licenses.

LIENS.

Generally.—One's services in looking after mining property, paying taxes and keeping trespassers off, constitute no lien which follow it into purchaser's hands. *Morrison v. Mining Co.*, 143—251.

Note under seal, reciting that it is for balance of purchase price of land, and registered, does not attach to legal title a trust for payment, and where second mortgage for different debt is given, note is no prior lien. *Carpenter v. Duke*, 144—291.

Purchaser of land at tax sale, who subsequently acquires invalid title for insufficient description, or void because not made in time, is entitled to have amount he has paid therefor declared a lien on land in his favor. *Mfg. Co. v. Rosey*, 144—370.

Where second mortgagee advanced money with which property in question was purchased, and prior registered mortgage provided for lien upon after-acquired property, last mortgage would not have a superior lien. *Lumber Co. v. Lumber Co.*, 150—288.

Crop.—Statute requiring crop liens to be in writing and registered, is only required so as to make claim good as against creditors and third persons, and to entitle holder to superiority given by statute over all other liens, except those of landlord and laborer. *Odom v. Clark*, 146—551.

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In order to have an effective agricultural lien, requisites of statute must be complied with, advancements must be made after agreement is perfected, and if made at same time instrument is executed, both acts being part of one and the same transaction, this requirement of the statute is satisfied. *Bargain House v. Watson*, 148—297.

Where part of consideration for agricultural lien was including a portion of debt unpaid the year before in with the advancements to be made for the current year, it is sufficient as a lien. *Ibid*, 148—297.

Where crop lien is executed and delivered, but no advances furnished, proper to charge that no part of crop could be held under the lien. *Sessoms v. Tayloe*, 148—373.

Action to enforce.—Where laborer or materialman fails to bring action within six months after filing notice of lien, he loses lien, but owner is personally liable. *Hildebrand v. Vanderbilt*, 147—641.

Lien of laborer or materialman must be filed in twelve months, but by Revisal 2022 it can be acquired without filing if statement of amount due is rendered owner, and lien is then lost if action is not begun in six months. *Ibid*, 147—641.

Subcontractor.—Work done and furnishing material in house, all in same entire contract, contractor entitled to lien upon property for whole amount, under mechanics, etc., lien law. *Isler v. Dixon*, 140—529.

When owner has fund due contractor, laborer or materialman is only entitled to his pro rata part after consideration of all such claims, and judgment which directs payment of this fund into court is irregular. *Hildebrand v. Vanderbilt*, 147—642.

When other claimants to fund in hands of owner, belonging to contractor, are not parties, judgment ascertaining debt of one claimant is not binding between owner and other claimants. *Ibid*, 147—642.

LIFE ESTATES.

To constitute a lien for work and labor done, it must not only be actual work and labor done, but it must be done under a contract for actual work and labor. *Bruce v. Mining Co.*, 147—644.

When Revisal, sections 20, 21, 22, 23, have been complied with, there is a direct obligation upon part of owner to materialman, and he may sue in his own name; but mere authority to contractor to collect debts due materialmen would not authorize him to sue in his own name on their behalf. *Perry v. Swanner*, 150—142.

Statutory lien for materials furnished does not attach to public school buildings. *Hardware Co. v. Graded School*, 150—681.

LIFE ESTATES.

Evidence that trustee made no attempt to recover possession of property, because told by life tenant not to, incompetent. *Kirkman v. Holland*, 139—185.

Tax title conveying life estate, under Act of 1874, not color of title against remainderman, nor is possession adverse till death of life tenant. *Smith v. Proctor*, 139—314.

Sale by sheriff, under revenue act of 1874, of life estate for taxes, does not convey remainder. *Ibid*, 139—314.

Estate of wife during her widowhood, is for life only. *Sink v. Sink*, 150—446.

Rights of tenant.—Where life estate is granted in consideration of a pepper-corn rent, life tenant is entitled to rents during continuance of lease if jury found it to be valid. *Smith v. Moore*, 145—269.

Life tenant has right to make additional clearings, if in exercise of prudence and judgment it was required for his support, and an instruction is erroneous which makes this right depend solely upon value of timbered land, as compared with value of cleared land. *Norris v. Laws*, 150—606.

LIFE TABLES.**Life Tables.**

See Evidence, mortuary tables;
Damages, generally.

Limitation of Action.

See Statute of Limitations.

Liquors.

See Intoxicating Liquors.

LIS PENDENS.

Claimant who loses deed before registration may protect his title by lis pendens. *Hinton v. Moore*, 139—48.

Live Stock.

See Railroads, injury to stock.

Local Prejudice.

See Removal of Causes.

Logs.

See Timber Deeds.

Lord's Day.

See Sunday.

Lost Instruments.

See Burnt and Lost Instruments.

Lunatic.

See Insanity; Lunacy; Fraud and Mistake.

LUNACY.

Inquisition.—When jury finds that person, subject of inquisition of lunacy, is incompetent from want of understanding to manage her own affairs, it is sufficient, under Revisal 1890, to authorize clerk to appoint guardian. In *re Denny*, 150—424.

MALICIOUS PROSECUTION.

When facts are admitted, duty of court to declare, as question of law, whether there is probable cause. *Moore v. Bank*, 140—293.

Malicious prosecution and abuse of process distinguished. *R. R. v. Hardware Co.*, 143—55.

MALICIOUS PROSECUTION.

An instruction that to constitute malicious prosecution there must be probable cause and malice, is correct. *Gaither v. Carpenter*, 143—240.

Malice is "a disposition to do the person prosecuted a wrong without legal excuse." *Ibid*, 143—240.

Where complaint sets up two causes of action, one for malicious abuse of process and other for malicious prosecution, and evidence shows grievance arises from prosecution for embezzlement, issue as to abuse of process should not be submitted. *Stanford v. Grocery Co.*, 143—419.

Damages.—Reasonable attorneys' fees paid in defense of malicious prosecution, competent upon question of damages. *Stanford v. Grocery Co.*, 143—420.

Punitive damages for malicious prosecution do not necessarily arise if jury finds issue of malice against defendant, but they must find the wrongful act was done from actual malice in sense of insult, rudeness or oppression. *Ibid*, 143—421.

Evidence.—Declaration of defendant at time he sued upon warrant, competent as *res gestae* and in corroboration. *Merrell v. Dudley*, 139—57.

That plaintiff owned real estate of large value, not material upon question of probable cause. *Moore v. Bank*, 140—293.

A reasonable or well grounded suspicion of the guilt of the accused, based on circumstances sufficient to justify a reasonable belief thereof in the mind of a cautious and prudent man, sufficient defense. *Ibid*, 140—303.

Declarations made by defendant to magistrate upon issue of warrant, competent as *res gestae* and substantive evidence. *Stanford v. Grocery Co.*, 143—420.

Statements made by defendant's salesman who made sale, and just after sale, to defendant's manager, who swore out warrant as to nature of trade with plaintiff, competent as corroborative of salesman

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and substantive testimony on question of whether there was probable cause for prosecution, and it was had in good faith. *Ibid*, 143—420.

Probable cause.—Malice may be inferred by jury when want of probable cause shown to their satisfaction. *Merrell v. Dudley*, 139—57.

Want of probable cause and corroborating circumstances not necessary to prove malice. *Ibid*, 139—57.

Only facts known to defendant at time of affidavit for warrant of attachment to be considered upon question of whether he had probable cause. *Moore v. Bank*, 140—293.

Facts in this case constitute probable cause for attachment. *Ibid*, 140—293.

It must appear that action has been instituted without probable cause, from malice, damage has been sustained, and proceeding has terminated. *Stanford v. Grocery Co.*, 143—419.

Where magistrate binds over a party, or grand jury returns a true bill, this makes out *prima facie* case of probable cause, and jury should so consider it. *Ibid*, 143—420.

In malicious prosecution, the term "malice" is used in the sense of ill-will, and may be inferred from absence of probable cause. *Ibid*, 143—421.

In action for malicious prosecution; question of probable cause arising from facts admitted or established, is one of law. *Morgan v. Stewart*, 144—424.

Acquittal by a court which has jurisdiction to try and determine the question does not make out a *prima facie* case of want of probable cause. *Ibid*, 144—425.

When defendant pleads guilty of an offense before magistrate, having final jurisdiction, and upon appeal he is acquitted, plea of guilty is such evidence of probable cause as will bar malicious prosecution. *Smith v. Thomas*, 149—102.

MANDAMUS.**MAILS.**

Telegrams and postal cards containing defamatory matter, transmitted in the usual manner, will be a publication. *Logan v. Hodges*, 146—40.

MALICE.

Malice is "a disposition to do the person prosecuted a wrong without legal excuse." *Galthier v. Carpenter*, 143—240.

See, also, *Malicious Prosecution; Process, abuse of*.

MANDAMUS.

Taxpayers in township are proper parties to bring mandamus to require expenditure of taxes as provided by statute, and there is no statute of limitations. *Jones v. Comrs.*, 143—60.

Denied.—Mandamus never lies to compel an unlawful or prohibited act. *Betts v. Raleigh*, 142—229.

Title to office cannot be determined upon mandamus. *Burke v. Comrs.*, 148—47.

Mandamus lies only where there is a legal duty without discretion. *Board of Education v. Comrs.*, 150—127.

Mandamus does not lie to compel specific performance of act by public officer, involving exercise of discretion on the part of officer to whom its performance is committed. *Ibid*, 150—121.

A mandamus or mandatory injunction lies to compel a corporation to transfer stock and to compel election of officers. *Sheppard v. Power Co.*, 150—781.

To public officers.—If school board refuse to establish school upon constitutional basis, mandamus proper remedy. *Lowery v. School Trustees*, 140—33.

Mandamus will not lie to compel county commissioners to repair or build a court house. Duty is to be discharged subject to indictment if there is a willful failure. *Ward v. Comrs.*, 146—536.

Mandamus lies only to compel performance of a specific act point-

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ed out by statute, and court possesses no function to control exercise of power reposed by statute in county authorities. *Ibid*, 146—538.

Mandamus will not lie against county commissioners to compel them to provide a sufficient court house. *State v. Leeper*, 146—661.

Remedy when superior court refuses to obey mandate of supreme court is by mandamus. *Tussey v. Owen*, 147—338.

Judge has jurisdiction at chambers and it is his duty to hear proceedings for mandamus to compel payment by county treasurer of order made by commissioners out of specific fund designated in the order, it not being a money demand within meaning of Rev. 824. *Audit Co. v. McKensie*, 147—467.

Mandamus is proper to enforce valid order of corporation commission, given in causes on appeal to superior court. *Hardware Co. v. R. R.*, 147—488.

Mandamus lies to require commissioners to consider bond of treasurer, but not to accept it, for they are individually liable if they take a bond known, or which should be known to be insufficient. *Burke v. Coms.*, 148—47.

Action by road commissioners to compel county treasurer to pay over road fund, is not a money demand, and may be brought before judge at chambers, and if anyone is aggrieved because of his failure to pay over, mandamus lies. *Coleman v. Coleman*, 148—301.

If the power of mandamus exists, courts are most reluctant to interfere and will never do so by civil process, unless local officers fail or refuse to act at all, or unless their action is so unreasonable as to amount to manifest and oppressive abuse of discretion. *Board of Education v. Comrs.*, 150—125.

MAPS.

Maps, diagrams, etc., are competent in civil and criminal actions when used to enable witness to explain his testimony, and enabling

MARRIED WOMEN.

jury to understand it, but not as substantive evidence. *Britt v. R. R.*, 148—39.

See Evidence, maps.

MARRIAGE.

Slave.—Under provisions of Act of March 10, 1866, the relation of man and wife existing between former slaves, if continued after passage of act, culminated into valid marriage. *Nelson v. Hunter*, 140—598.

Two essential conditions of Act of 1879; cohabitation at birth of child and paternity of party from whom property claimed is derived. *Ibid*, 140—599.

When it is not shown that marriage of slaves has come within provisions of Act of March, 1866, declarations of woman claiming man as her husband, and general reputation thereof, are incompetent as evidence of lawful marriage to legalize issue born of them. *Ibid*, 144—763.

In civil cases, reputation, cohabitation, declaration and conduct of parties are competent to prove that marriage relation existed between slaves. *Spaugh v. Hartman*, 150—456.

Settlement, conveyance of.

Where feme sole has made deed of marriage settlement of her separate estate, real or personal, to a trustee, for her sole and separate use, her power of disposition over it during marriage is limited to manner prescribed by deed. *Dunlap v. Hill*, 145—314.

Marriage settlement may include disposition and control of future acquired property, real and personal, but to restrict wife's power to acquire property by purchase and control it when so acquired, since 1868, language of instrument should be plain, and intent to do so unequivocal. *Ibid*, 145—315.

MARRIED WOMEN.

Justice's judgment against married woman, valid when. *McAfee v. Gregg*, 140—448.

MARRIED WOMEN.

Abandoned wife may use her property for her support, though husband living in state. *Vandiford v. Humphrey*, 139—65.

When wife abandoned, she may contract before six months expire in which to bring divorce. *Ibid*, 139—65.

Status of married women summarized. *Ball v. Paquin*, 140—97.

There is no statute which authorizes or recognizes a feme covert "charging her property in equity." *Ibid*, 140—99.

Adverse possession against married woman could not be counted prior to 1899. *Norcum v. Savage*, 140—472.

Where husband and wife are sued in a justice's court of a county other than their own, judgment by default entered and land sold under execution, purchaser acquired no title. *Rutherford v. Ray*, 147—259.

For feme plaintiff to collaterally attack judgment of a justice in another action, in which she was a defendant, her coverture must have appeared on the face of the record. *Ibid*, 147—257.

Married woman may maintain action in her own name for injury to her land, caused by improper construction of roadbed. *Willis v. White*, 150—205.

Note signed by feme covert alone, but with written consent of her husband, will not bind her separate personal estate to its payment, when it does not expressly or by clear intendment, create a specific charge against her property, sought to be bound for its payment. *Bank v. Benbow*, 150—783.

For wife to bind her real property, she must execute a formal conveyance, or some paper writing which, in equity, may be charged upon her separate estate, with written assent of husband and her privy examination. *Ibid*, 150—783.

Contracts of.—In ejectment, deed executed by wife alone, she being abandoned by her husband, is proper and necessary in making

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out chain of title. *Witty v. Barham*, 147—480.

When question of validity of deed of feme covert, in which husband did not join, depends on whether or not husband had not previously abandoned her, evidence of his long continued absence and certificate of subsequent marriage, is competent. *Ibid*, 147—481.

To support validity of trust deeds made by feme covert alone, upon question of abandonment, evidence of her extreme destitution and necessity of her mortgaging her lands to live, is competent. *Ibid*, 147—481.

Question of abandonment affecting validity of deed of feme covert without husband joining, is evidential matter and arises only when objection is made thereto, and need not be set up by plea. *Ibid*, 147—481.

Contract for labor and material for dwelling on wife's land, sufficient to charge her estate. *Ball v. Paquin*, 140—83.

Lien is given upon property of married woman for all debts contracted for work and labor done. *Ibid*, 140—83.

Judgment of court having jurisdiction of cause and parties against married woman on contract, made during coverture, will be set aside, on direct application, when it appears by pleadings that she was under coverture at the time contract was made, though this defense was not formally made, but it is binding upon her when it stands as formal and final deliverance of court. *Windley v. Swain*, 150—360.

Note signed by feme covert alone, but with written consent of her husband, will not bind her separate personal estate to its payment when it does not expressly or by clear intendment create a specific charge against her property sought to be bound for its payment. *Bank v. Benbow*, 150—783.

For wife to bind her real property, she must execute a formal

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conveyance or some paper writing which in equity may be charged upon her separate estate, with written assent of husband and her privy examination. *Ibid*, 150—783.

Freetraders.—Where husband, a drummer, only occasionally in town, was in wife's store when she bought goods of defendant, which facts were known to seller, *Revisal* 2118 does not apply so as to make wife a free-trader. *Weld v. Shop Co.*, 147—590.

MARSHALLING ASSETS.

In action by junior mortgagee against senior mortgagee restraining him from foreclosing upon all land in his mortgage, and defendant mortgagor set up affirmative defense that more land was conveyed in plaintiff's mortgage than was intended, appeal by plaintiff from adverse judgment on affirmative defense was premature. *Gray v. James*, 147—141.

In action by junior against senior mortgagee asking for marshalling of assets, order of sale of different lots, stated. *Ibid*, 147—140.

Where husband conveys portions of his land without joinder of wife, but retains lands which would descend to his heirs, equity requires that dower be assigned in lands descended. *Harrington v. Harrington*, 142—521.

MASTER AND SERVANT.

Generally.—Employee may rescue employer's property negligently fired, but not if obviously dangerous. *Pegram v. R. R.*, 139—303.

Special contract of employment not affected by defendants' rules, known to plaintiff, that its servants were hired by month and subject to discharge at will. *King v. R. R.*, 140—433.

Payment by master in garnishment proceeding in another State, good defense to action by servant for services, where he was personally served. *Wright v. R. R.*, 141—164.

One's services in looking after

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mining property, paying taxes and keeping trespassers off, constitute no lien which follow it into purchaser's hands. *Morrison v. Mining Co.*, 143—251.

Where one lends his servant to another for a particular employment, the servant, for anything done in that particular employment, is the servant of the man to whom he is lent, though the general servant of person who lent him. *Britt v. R. R.*, 144—248.

Duty of servant to be careful and guard against accidents, and charge upon contributory negligence approved. *Avery v. Lmbr. Co.*, 146—596.

Charge as to duty of servant to use due care for his own safety, approved. *Midgette v. Mfg. Co.*, 150—347.

Assumption of risk.—Working in presence of dangerous conditions in honest effort to faithfully discharge duty, plaintiff not absolved from all care on his part. *Biles v. R. R.*, 139—528.

Where plaintiff injured in performance of duty, as proximate consequence of defective appliance, defense of assumption of risk not open to defendant. *Ibid*, 139—528.

Master is liable for negligence in respect to such acts and duties as he is required, or assumed to perform, without regard to rank or title of agent entrusted with performance. *Tanner v. Lumber Co.*, 140—475.

While servant assumes risk incident to riding on loaded log cars, he does not assume risk resulting from defective car. *Ibid*, 140—478.

Working on in presence of defective appliance, usually treated as assumption of risk, has been eliminated by Fellow Servant Act, but if plaintiff in his own conduct has committed contributory negligence, his action fails, except in extraordinary cases like *Greenlee* and *Troxler*. *Biles v. R. R.*, 143—78.

Conductor guilty of negligence, where wind blew lantern out on dark, stormy night and he did not

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light it, felt his way along platform with his feet, and fell down steps which he knew were there. *Beard v. R. R.*, 143—137.

In action for injuries caused by lack of automatic couplers, when jury finds issue of negligence against defendant, defenses of assumption of risk and contributory negligence are closed as to it, unless negligent conduct of employee amounts to recklessness. *Hairston v. Leather Co.*, 143—512.

Employee assumes no risk in proper use of defective appliances after notifying employer thereof, who promises to remedy defect; but he must use them with proper regard to their known condition, and failing in this, he would be guilty of contributory negligence. *Britt v. R. R.*, 144—243.

Where employee steps outside of line of duty or goes beyond scope of employment and does something he is not required to do, he assumes risk of consequent injury. *Patterson v. Lbr. Co.*, 145—43.

Duty of employer to keep machinery in safe condition for protection of those employed to perform stated service, does not extend to act done by employee of his own volition, outside of employment, and he is injured by defective machine. *Ibid.*, 145—42.

Prayer for instruction upon assumption of risk in this case, proper. *Ibid.*, 145—42.

If shifter became defective after plaintiff began work, he was not required to abandon his employment—nor did he assume the risk incident to such negligence. *Sibert v. Cotton Mills*, 145—312.

Servant does not assume risk growing out of master's failure to provide safeguards, unless the danger arising from such defect was obvious and so imminent that no man of ordinary prudence would have incurred the risk. *Aiken v. Mfg. Co.*, 146—327.

Where green hand is directed by boss to do something not obviously dangerous, in line of his duty, and

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without warning, and servant is injured thereby, master is liable. *Avery v. Lbr. Co.*, 146—596.

When machine operated by plaintiff had a safety guard and foreman directed it to be taken off and machine operated without it, and servant was injured on account thereof, there is no contributory negligence or assumption of risk. *Bennett v. Mfg. Co.*, 147—622.

Judge's charge upon assumption of risk proper. *Rushing v. R. R.*, 149—160.

See also, *Bull v. R. R.*, 149—429.

Competent employees.—Duty of employer who has ordered plaintiff to fix engine, to furnish competent man to assist him, and if it failed to do so, this was negligence, and if proximate cause, was actionable. *Horton v. R. R.*, 145—137.

If one whose duty it is to hold iron rod while another person, is in a position with reference to it that dropping it will injure him, it is duty of him who is holding it to use ordinary care to prevent its dropping. *Ibid.*, 145—137.

Those entrusting authority to control others are held responsible for the manner of its exercise; if abused, those conferring it are held responsible for its abuse. *Shaw v. Mfg. Co.*, 146—239.

Employment by necessity.—Railroad liable for injury to passenger, on his way to train, by being struck by truck rolled by newspaper porter, on principal that it has temporarily accepted him as its servant. *Mangum v. R. R.*, 145—152.

Conductor of freight trains has no authority to employ servants to assist in operating train, save in emergency. *Vassor v. R. R.*, 142—68.

Fellow Servant Act.—Effect of Fellow Servant Act is to abolish, as to railroads, Fellow Servant Doctrine, and make company responsible for negligent acts of employees in course of employment. *Mabry v. R. R.*, 139—388.

Fellow Servant Act must be read into contract for service with rail-

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road made in this State. *Miller v. R. R.*, 141—45.

Fellow Servant Act operates on all employees of railroad company, whether in superior, equal or subordinate positions. *Fitzgerald v. R. R.*, 141—530.

Test as to whether one is a fellow servant is not the right of the superior servant to hire or discharge plaintiff, but whether the other was entrusted by defendant with discharge of duties they owed plaintiff. *Chesson v. Walker*, 146—512.

The superior cannot escape liability for that injury was caused by a fellow servant, without connecting him with cause of injury. *Ibid.*, 146—512.

When master has scaffold built by one servant upon which another is directed to work, master owes servant the duty to exercise due care in selecting materials reasonably suitable and safe for its construction. *Barkley v. Waste Co.*, 147—587.

An order or rule given by conductor to those working under him, should be given while he was acting as vice-principal toward employee and to govern his future conduct; with expectation and intent that it should be observed. *Smith v. R. R.*, 147—609.

Fellow Servant Act applies to corporation chiefly engaged in manufacturing, which owns and operates engines, cars, crews, etc., *Bird v. Leather Co.*, 143—283.

Lumber roads and street railways are "railroads" within meaning of Fellow Servant Act. *Hemp-hill v. Lbr. Co.*, 141—487.

See also, *Liles v. Lbr. Co.*, 142—39.

Discharge.—When one contracts to serve another there is an implied representation that he is competent, and upon breach of any material stipulation which disables servant to discharge his part of contract, it is a legal excuse for discharge of servant. *Ivey v. Cotton Mills*, 143—189.

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In action to recover for services, burden is upon defendant to show good cause for discharge, and if plaintiff failed to perform his duty, defendant had right to discharge him, and if he performed his part of contract and did not withdraw from service, jury should find that he was wrongfully discharged. *Ibid.*, 143—190.

In this country, when no time is fixed for duration of contract of employment, and no stipulated period of payment made, contract is terminated at will of either party. *Currier v. Lumber Co.*, 150—695.

Letters showing an offer and acceptance of employment at certain price per month, can not be construed as a contract for a year. *Ibid.*, 150—695.

Inspection.—Telephone line should be inspected frequently, depending upon soil and other conditions. *Harton v. Tel. Co.*, 146—429.

Duty of master to use reasonable care, by proper construction and frequent inspection, to have and keep machinery in working order. *Sibbert v. Cotton Mills*, 145—311.

Negligent act of vice-principal.—Where plaintiff was injured by fall of a scaffold, negligently constructed for defendant by one Michael, to whom the performance of this duty was delegated, whatever place in its service Michael filled, the defendant is responsible for the manner in which he discharged his duty. *Barkley v. Waste Co.*, 149—288.

Safe place to work and safe appliances.—Employee cannot recover when he fails to use an instrument which if used would have averted the injury. *Horne v. Power Co.*, 141—50.

Duty of employer to furnish employee reasonably safe appliances with which to discharge duty, and duty of employee to exercise reasonable care in using them. *Ibid.*, 141—50.

Instruction upon duty of defendant to provide plaintiff with rea-

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sonably safe place to work, correct. *Miller v. R. R.*, 141—46.

Duty of master to provide employees safe place to work, machinery and appliances reasonably safe and such as are approved and in general use. *Fearington v. Tobacco Co.*, 141—80.

Master exposes servant to extraordinary risk if he fails to furnish reasonably safe machinery. *Moore v. R. R.*, 141—111.

Engineer may recover for injury from oil cup thrown against his eye, caused by defective engine. *Ibid.*, 141—111.

Failure of master to provide shield or covering for saw running naked, which protection is a reasonable one and in general use, is negligence. *Jones v. Tobacco Co.*, 141—202.

Jury may draw inference of general custom that large number of factories and mills used shields for saws in similar work. *Ibid.*, 141—202.

Master's duty to exercise ordinary care in having chain annealed at proper times, and where injury results from its failure, it is negligent. *Isley v. Bridge Co.*, 141—220.

Standard of duty is fixed by law, not by rules of masters, an rules do not absolve company for all care for safety of employees. *Stewart v. R. R.*, 141—254.

Master's acquiescence in use of an appliance for some purpose other than that for which intended, puts him in same position as if originally furnished for that purpose. *Wallace v. R. R.*, 141—646.

Duty of master to have cross-piece secured in reasonably safe manner for use to which its servants customarily put it, not affected by fact that shipper put it on in loading car. *Ibid.*, 141—647.

While servant assumes risk incident to riding on loaded log cars, he does not assume risk resulting from defective car. *Tanner v. Lumber Co.*, 140—478.

Refusal to nonsuit proper, where employee, acting under order of su-

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perintendent, was injured in coupling defective cars, of which he had no notice till too late to escape. *Liles v. Lumber Co.*, 142—39.

Charge in this case for damages received from defective machinery, proper. *Cotton v. Mfg. Co.*, 142—528.

In action for injuries received in cleaning defective machine, of which plaintiff had no notice, and had it been in good condition there was no danger to be reasonably apprehended, question for jury. *Hicks v. Mfg. Co.*, 143—73.

Working in presence of dangerous conditions in honest effort to faithfully discharge duty, plaintiff not absolved from all care on his part. *Biles v. R. R.*, 139—528.

Employee may recover when without any carelessness on his part, and by order of his superiors, he stepped on pilot of engine and was injured because it did not have hand-holds on pilot beam, and he didn't know they were gone. *Ibid.*, 143—78.

In action for negligence against railroad, working on in presence of defective appliance, usually treated as assumption of risk, has been eliminated by Fellow Servant Act, but if plaintiff in his own conduct, has committed contributory negligence, his action fails, except in extraordinary cases like *Greenlee and Troxler*. *Ibid.*, 143—78.

Where railroad neglects primary duty to servant and puts in his hand defective and unsafe appliances, by which servant is injured, master is liable. *Ibid.*, 143—86.

When under instructions from superior officer, plaintiff, in repairing machinery, with knowledge of defects, negligently caused an injury to himself in such manner as it was his duty in repairing to prevent, cannot recover, and *Revisel*, section 1905, has no application. *Mathis v. R. R.*, 144—162.

Evidence that wheels were boxed in one other mill, does not show usual custom. *Sibbert v. Cotton Mills*, 145—311.

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If shifter became defective after plaintiff began work, he was not required to abandon his employment—nor did he assume the risk incident to such negligence. *Ibid*, 145—312.

Question for jury whether one placed himself in place of obvious danger in standing behind bed-plate of machine as it stood on edge, and directing battering-ram propelled against it from other side. *Shaw v. Mfg. Co.*, 143—131.

Duty of railroad to use reasonable care to provide and maintain safe switch and keep it properly adjusted, and where it was not so adjusted and set to main track, and injury occurs, negligence is presumed. *Haynes v. R. R.*, 143—134.

Where foreman of force unloading cars, engaged in performance of duty, was injured because some cars stopped on incline a few feet away, commenced to move without warning to plaintiff, and struck car on which he was standing, proper case for jury. *Bird v. Leather Co.*, 143—283.

Duty of employer to furnish reasonably safe appliances for use by employee, and where plaintiff notified defendant's manager of defective chain and requested other chains usually used in such work, which manager promised to furnish, and instructed plaintiff to proceed with work in which injury was occasioned, sufficient for jury. *Britt v. R. R.*, 144—242.

A servant may expect that his master will not surround him with dangerous agencies, or expose him to their operation, whether they are in charge of the master's servants or an independent contractor. *Ibid*, 144—253.

Employer owes employee a legal duty in exercise of reasonable care to provide not only a safe place in which to work, but a way of access and departure from that work that is reasonably safe. *Nelson v. Tobacco Co.*, 144—420.

An employer of labor, in exercise of reasonable care, and having re-

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gard to kind and character of the work, shall provide for his employees a safe and suitable place in which work is to be done. *Bradley v. R. R.*, 144—558.

Duty of street railway company to keep its tracks properly constructed and in good condition, also its cars and motive power, and to operate same by competent persons and in proper manner. Where a derailment is shown, a *prima facie* case is made out and defendant must show that injury was accidental. *Overcash v. Electric Co.*, 144—572.

Duty of employer to keep machinery in safe condition for protection of those employed to perform stated service, does not extend to act done by employee of his own volition, outside of employment, and he is injured by defective machine. *Patterson v. Lumber Co.*, 145—42.

Where fireman, in order to save his life, was compelled to jump from engine, evidence of speed of engine and condition of wrecked cars is competent upon question of necessity. *Davis v. R. R.*, 145—95.

Employee may recover when he used defective machinery, which he had repeatedly reported to his superior, who promised to furnish another but failed to do so. *Boney v. R. R.*, 145—249.

Duty of master to use reasonable care, by proper construction and frequent inspection, to have and keep machinery in working order. *Sibbert v. Cotton Mills*, 145—311.

"Known, approved and in general use," when applied to machinery, means that master is not required to adopt every new invention on market; but sufficient number of persons for sufficient length of time must have used the appliance to test its value, and it must be reasonably within reach of employer. *Phillips v. Iron Works*, 146—214.

In the making and testing of steam-tight cans, if the jury should find that the use of a safety valve

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was known, approved and in general use, an injury from failure to use it would be negligence. *Ibid*, 146—217.

Where servant complained to defendant's superintendent that appliances furnished him were insufficient, one of which was defective, and also for lack of proper help to do work, he was instructed to go ahead and use tools furnished, and other help would be furnished, which was not done, from all of which he was injured, facts are for jury. *Shaw v. Mfg. Co.*, 146—238.

Where servant, by lack of sufficient tools is injured, he may explain to jury the use of the missing tool and what he would have done with it had it been furnished. *Ibid*, 146—240.

Duty of railroad to furnish brakeman safe place to walk over train, and where he was killed by falling off a "round top" car at night, and this was proximate cause, action lies. *Freeland v. R. R.*, 146—266.

Instruction upon master's duty to provide servant with safe place to work, approved. *Aiken v. Mfg. Co.*, 146—327.

Master is liable for injuries to servant, caused by falling from narrow scaffold, without railings, and wet with rain, where servant was an inexperienced youth and had not known of or used the scaffold any length of time. *Ibid*, 146—326.

Telephone line should be inspected frequently, depending upon soil and other conditions. *Harton v. Tel. Co.*, 146—429.

Where a telephone lineman had been notified of a fallen pole, and six days later one was injured thereby, it was manifest negligence. *Ibid*, 146—433.

Where custom of employees for ten years had been to cross tracks, go under and over cars when crossing was blocked, it was defendant's duty to provide subway, over-head bridge or guards. *Beck v. R. R.*, 146—456.

Master owes a duty, which he cannot safely neglect, to furnish

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proper tools and appliances to his servant, and where a green hand is directed by his superior to oil running machinery with a bottle, instead of a squirt can, and on account thereof he was injured, action lies. *Avery v. Lumber Co.*, 146—595.

When master has scaffold built by one servant, upon which another is directed to work, master owes servant the duty to exercise due care in selecting materials reasonably suitable and safe for its construction. *Barkley v. Waste Co.*, 147—587.

Evidence that material from which scaffold was constructed had been scorched in a fire, wood was knotty, and timber broke at a knot, is for jury upon question of defendant's exercising reasonable care in its construction. *Ibid*, 147—587.

When one is injured by falling of defective scaffold built by another, he has right to rely upon assurance of foreman that it was safe. *Ibid*, 147—588.

When machine operated by plaintiff had a safety guard and foreman directed it to be taken off and machine operated without it, and servant was injured on account thereof, there is no contributory negligence or assumption of risk. *Bennett v. Mfg. Co.*, 147—622.

Servant who is injured from lack of safety appliance in general use, may explain that he could not have been hurt if he had the appliance, and whether he would have used it had it been furnished. *Ibid*, 147—621.

Spur tracks not required to be kept up to same standard of excellence as main line, but sidings and spurs, should be kept in reasonably safe condition for traffic done over them. *Dortch v. R. R.*, 148—578.

If lug hooks were generally used in moving timbers, as in this case, and plaintiff's injury was caused by its failure to furnish them to him

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for the work, master is liable. *Rushing v. R. R.*, 149—160.

Where laborer around depot was ordered by baggage-master to help push truck to train, and a wheel ran off because the pin that held it on the spindle was bent down, and plaintiff was injured, he had a right to assume that truck was in a safe condition, and may recover. *Cotton v. R. R.*, 149—232.

Master's duty does not end with providing safe and suitable machinery, but he is also bound to exercise a reasonable supervision over it and to exercise ordinary care in keeping it in safe condition for use by his servants, and this duty he cannot rid himself of by casting it upon an agent. *Ibid*, 149—232.

Where plaintiff was injured by fall of a scaffold, negligently constructed for defendant by one Michael, to whom the performance of this duty was delegated, whatever place in its service Michael filled, the defendant is responsible for the manner in which he discharged his duty. *Barkley v. Waste Co.*, 149—288.

Duty of master who leases mill to independent contractor, stated. *Midgette v. Mfg. Co.*, 150—340.

Plaintiff must show that his instestate was in employ of defendant, and he may show that person in charge was not his servant, if he can, and that property was not under his control at the time, and accident was caused by stranger, independent contractor or other person. *Midgette v. Mfg. Co.*, 150—342.

Court refuses to hold that one may, under form and semblance of independent contractor, operate second-hand mill, in bad repair and dangerous to employees, for purpose of sawing logs, and escape liability for injuries to employees who, in good faith, and upon reasonable grounds, supposed they were working for owner of mill. *Ibid*, 150—345.

Where character of work to be done was essentially dangerous,

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duty to use due care could not be delegated to independent contractor by owner. *Ibid*, 150—345.

Charge as to master's duty to furnish servant safe appliances, etc., approved. *Ibid*, 150—346.

While a servant may not recover when he has voluntarily placed himself in a dangerous position, which is not his post of duty, yet he may recover for injuries received while sitting down, at his post, ready to perform his full duty, instead of standing up as directed. *Redman v. R. R.*, 150—405.

Judge's charge upon duty of master to give employee safe place to work, approved. *Blevins v. Cotton Mills*, 150—498.

Servant must show that injury was due to defect in machine at which he was working for defendant, and that defendant had notice or could by reasonable care have had notice of defect in machine. *Ibid*, 150—499.

Where complaint stated that injury was caused by defective fastening of door, plaintiff can only recover for this negligent act, though stripping stick, not a safety appliance and not connected with the door, was out of order. *Ibid*, 150—500.

Employer does not insure safety of servant; he is not bound to furnish absolutely safe place for him to work in, and he satisfies requirements of law if in selection of his appliances he uses that degree of care which a person of ordinary prudence would use, having regard for his own safety, if he were supplying them for his own use. *Nail v. Brown*, 150—535.

It is culpable negligence which makes master liable to servant, not mere error of judgment in selection of appliances. *Ibid*, 150—535.

Scope of employment.—Servant is acting in course of employment when engaged in that which employed to do and is about master's business. *Jackson v. Tel. Co.*, 139—347.

If servant wrong another in

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course of scope of employment, respondent superior, applies. *Ibid*, 139—347.

Liability of master for tort of servant tested by whether injury committed by authority of master expressly confessed or fairly implied. *Sawyer v. R. R.*, 142—1.

Where act is not clearly within scope of servants employ, but evidence tends to establish that fact, question for jury whether or not tortious act was authorized. *Ibid*, 142—1.

Where plaintiff went to defendants office for work and was told by an officer that it did not want him, and proceeded to insult plaintiff, defendant not responsible. *Ibid*, 142—1.

Railroad not liable for assault by one of its servants, who had quit work for the day, upon another servant. *Roberts v. R. R.*, 143—180.

Action for false arrest by defendant's servants, employed to collect its debts, will not lie, in absence of allegation in complaint or evidence that tort was committed by servants in scope of their authority in furtherance of master's business. *Powell v. Fiber Co.*, 150—14.

Wanton acts.—Vindictive damages allowed, when. *Jackson v. Tel. Co.*, 139—347.

Master liable for tort of servant. *Ibid*, 139—347.

Jury may award punitive, in addition to compensatory damages, if defendant acted wantonly with criminal indifference to civil obligations. *Ibid*, 139—347.

Punitive damages proper where passenger wrongfully ejected from train at night, by conductor in rude, stern, harsh, humiliating manner. *Parrott v. R. R.*, 140—546.

Master's duty to third person may arise from ownership or custody of dangerous things, and it may extend to conduct of servant, though forbidden, and for the servant's private purpose and not for master's benefit. *Stewart v. Lumber Co.*, 146—50.

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Where engineer blew whistle for sole purpose of scaring plaintiff's mule, but not at a crossing or in furtherance of master's business, only compensatory damages allowed. *Ibid*, 146—49.

Master not liable for punitive damages for wanton act of servant in absence of evidence of ratification or negligence of master in selecting a reckless servant. *Ibid*, 146—52.

Master is only liable for punitive damages for act of servant when he acts within scope of his employment. *Ibid*, 146—54.

Punitive damages are never awarded for compensation, but only for punishment of offender who actually or by legal construction participated in offense. *Ibid*, 146—54.

Where servant wantonly shot a trespasser stealing a ride, and when, without objection or exception, an issue is found by the jury that defendant's servant was not acting within scope of his employment when he committed the assault, master is not liable. *Jones v. R. R.*, 150—478.

Warning.—Plaintiff put his hand in saw-dust box, under ordinary circular saw, requiring no special instruction, he cannot recover for injury. *Mathis v. Mfg. Co.*, 140—530.

Master is negligent when he puts employee to work upon new machine which had an opening, differing from old style machine, by which plaintiff's hand was hurt, when he is not warned of the opening and he could not have known of it by exercise of ordinary care. *Hicks v. Mfg. Co.*, 143—73.

Duty of one who employs child, under statutory age, to furnish safe machinery and instruct him in its use when dangerous, and child is only required to use such care as one of its years and experience may be expected to possess. *Leathers v. Tobacco Co.*, 144—331.

Where green hand is directed by boss to do something not obviously

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dangerous, in the line of his duty, and without warning, and servant is injured thereby, master is liable. *Avery v. Lumber Co.*, 146—596.

Master is liable for negligent failure of superior servant to instruct an inexperienced youth in his work. *Chesson v. Walker*, 146—512.

Judge's charge upon master's duty to warn servant of unexpected or unusual movement of train, approved. *Redman v. R. R.*, 150—403.

Duty of giving warning of unusual and unexpected movement of train, to employees whose duty it is to be on cars, is manifest. *Ibid.*, 150—404.

Mayor.

See *Municipal Corporations*, mayor.

Measure of Damages.

See *Damages*, measure of.

Mechanics' Lien.

See *Lien*, subcontractors.

Medicine.

See *Negligence*; *Mental Anguish*.

MENTAL ANGUISH.

Delay of twenty-eight hours in delivery of telegram announcing illness of wife, some evidence of mental anguish. *Hamrick v. Tel. Co.*, 140—151.

Damages for mental anguish, nor loss of service of child, not recoverable in action under code, 1498. *Byrd v. Express Co.*, 139—273.

Husband entitled to damages for mental anguish. *Dayvis v. Tel. Co.*, 139—80.

Notice to be given company in suit for mental anguish. *Ibid.*, 139—78.

Not necessary that claimant be very near relative to recover for negligent transmission of telegram. *Ibid.*, 139—78.

Not necessary that telegram announce sickness, but grievance complained of should amount to

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high degree of mental suffering, not regret. *Ibid.*, 139—78.

Evidence of mental anguish, incompetent. *Ibid.*, 139—78.

Mental anguish to be proved, not presumed. *Alexander v. Tel. Co.*, 141—75.

To recover substantial damages for mental distress caused by delayed message, necessary to show that defendant could reasonably have foreseen from face of message, or extraneous information, that damage would result from breach of duty. *Harrison v. Tel. Co.*, 143—147.

No presumption of mental anguish on account of delayed message, growing out of relation of stepmother and son, but is a fact that plaintiff may prove if she can. *Ibid.*, 143—148.

In action for mental anguish on account of delayed message, evidence that plaintiff had no child of her own, that she raised deceased from small boy, that he treated her with affection and called her mother, etc., is evidence that she suffered more than disappointment, and is question for jury. *Ibid.*, 143—148.

Damage for mental anguish proper, when incident to defendant's wrongful refusal to deliver whiskey bought on account of sickness. *Thompson v. Express Co.*, 144—389.

Where rights of one legally entitled to custody of dead body are violated by mutilation of body or otherwise, party injured may in action for damages recover for mental suffering caused by the injury. *Kyles v. R. R.*, 147—399.

Mental anguish allowed in certain cases in absence of physical injury. *Ibid.*, 147—399.

Wife not entitled to recover anything for grief at seeing mutilated body of husband in coffin. *Ibid.*, 147—402.

One cannot recover damages on account of delayed message, where he saw his brother's body after decomposition had advanced so far

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that his features could hardly be recognized. *Woods v. Tel. Co.*, 148—8.

Damages for mental anguish may be recovered in State where message is sent, although it is to be delivered in a State which does not allow a recovery of such damages, but if both states from and to which message is sent refuse to allow damages for mental suffering, such damages cannot be recovered in suit brought in another State which does allow such damages, and is one through which the company has a line. *Ibid*, 148—8.

Mental suffering accompanying physical injury has always been held a proper element of damages. *Britt v. R. R.*, 148—39.

Telegraph company must be notified in some way that mental anguish will naturally and reasonably follow as a result of its negligence, either by information contained in the message itself or facts within its knowledge at the time, or brought to its attention at time of receipt of message. *Suttle v. Tel. Co.*, 148—483.

Where telegram announcing death of plaintiff's niece, with whom he had lived in his brother's home, character of message put defendant upon notice of its importance, and question of mental anguish endured is for jury. *Pierson v. Tel. Co.*, 150—561.

MENTAL CAPACITY.

Sufficient.—Test of sufficient mental capacity. *Sprinkle v. Wellborn*, 140—165.

If testator at time he signed will had mental capacity to know and understand what he was doing, the property he owned and wished to dispose of; relation he bore to his property and the persons to whom he was giving it; nature of the act in which he was engaged, and its extent and effect, he had sufficient mental capacity to make will. *In re Thorp*, 150—492.

Mental incapacity of grantor and fraud and undue influence of gran-

MONEY.

tee need only be shown by greater weight of evidence. *Fraley v. Fraley*, 150—503.

Decision of three friends called in by grantor to pass upon value of his lands to be conveyed to his children, in consideration of their supporting him during his lifetime, not made in his presence, but immediately stated to him by his friends, is part of *res gestae*. *Ibid*, 150—505.

MERCANTILE AGENCY.

Statements to.—Where one gave information to a credit agency that he was a member of a certain firm, and within a reasonable time he gave agency notice that he had ceased to be a partner, he would not be liable for goods sold firm, except such as plaintiff might have sold prior to expiration of reasonable time during which agency should have notified plaintiff. *Rheinstein v. McDougall*, 149—253.

Merger.

See Corporations, merger.

MILL SEAT.

"Mill seat" means mill house, dam, and appurtenances used for operating water-mill, and ground upon which they stand. *State v. Sutton*, 139—574.

Minor.

See Infancy.

Misjoinder.

See Parties, defect of; *Demurrer*, misjoinder of parties.

Mistake.

See Fraud and Mistake.

Mistrial.

See Judge, discretion of.

Money.

See Contracts, implied; Payment, money had and received.

MONOPOLIES.

MONOPOLIES.

Selection by a commission of persons qualified to act as pilots, is not violative of Article 1, Sections 7 and 31 of our Constitution, prohibiting exclusive emoluments or privileges. *St. George v. Hardie*, 147—96.

MORTGAGE.

Generally.—Husband may mortgage his right to receive rents and profits from land held by entireties. *Bynum v. Wicker*, 141—96.

Where land belongs to husband he may execute second mortgage without joinder of wife, there being no docketed judgments, no homestead, though value less than \$1,000. *Shackleford v. Morrill*, 142—222.

Where husband's land is to be sold under first and second mortgage, and wife joined only in first, her dower is protected if land more than pays first mortgage. *Ibid*, 142—221.

Where mortgage debt not shown, declaration of one that she owned debt, but not shown to have title, incompetent. *Hodge v. Hudson*, 139—358.

Facts constitute relation of mortgagor and mortgagee. *Bunn v. Braswell*, 139—135.

Ten years possession of mortgagor after default, bars mortgagee. *Ibid*, 139—135.

Mortgagor in possession, after default, is tenant by sufferance and may be ejected by mortgagee at any time, without notice. *Ibid*, 139—135.

Agreement to turn mortgage into deed in case of default, finds no favor in equity. *Ibid*, 139—143.

When mortgage transferred, but not mortgage debt, assignee may be regarded as having interest in debt for which note and mortgage were securities. *Chemical Co. v. McNair*, 139—332.

When land is mortgaged and building thereon insured for mortgagee's benefit; second mortgage is given, with covenant for further in-

MORTGAGE.

surance for benefit of second mortgagee's benefit, and when building burns and first mortgage is paid by sale of land, second mortgagee is subrogated to first mortgagee's right to insurance. *Fitts v. Grocery Co.*, 144—463.

In absence of fraud, undue influence and the like, mortgagor is estopped from asserting her title as against that of a purchaser under mortgage sale regularly made. *Call v. Dancy*, 144—494.

Where mortgage is given upon stock of goods, and parol lien upon after-acquired goods, it is as good between the parties as if in writing. *White v. Carroll*, 146—233.

Statute of limitations, when properly pleaded, will bar action for debt, securing balance of purchase price of land, so as to prevent any judgment in personam to be collected out of other property of debtor, but will not prevent appropriation of property held under bond till ten years from demand and refusal. *Worth v. Wrenn*, 144—662.

One partner may execute chattel mortgage on partnership goods to secure firm debt. *Odom v. Clark*, 146—550.

Parol chattel mortgage between parties is good. *Ibid*, 146—551.

A chattel mortgage is a conditional sale of personal property as security for payment of a debt or performance of some other obligation. *Ibid*, 146—548.

Burden of proof upon him who claims verbal chattel mortgage, is by greater weight of evidence. *Ibid*, 146—549.

When upon face of instrument it is doubtful whether it is a conditional sale or a mortgage, court inclined to consider it a mortgage, and will look to acts of parties and circumstances attending the transaction. *Wilson v. Fisher*, 148—540.

Evidence here indicates a sale of property and not a mortgage. *Leak v. Bank*, 149—19.

Mortgagee has no right to tack

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unsecured debt to mortgage debt and demand both as condition to redemption. *Rich v. Morisey*, 149—48.

Heir of mortgagor should pay his debt on land, subject to reduction of rents and profits, for which mortgagee in possession was liable. *Ibid*, 149—48.

Where vendor placed vendee in possession of land under contract to buy, deed to be executed on certain day, the relation of mortgagor and mortgagee exists and vendee cannot be foreclosed of his rights, upon default in payment by vendee's selling to another. *Freeman v. Bell*, 150—149.

Use of words "their heirs and assigns," in mortgage, in referring to corporation, does not vitiate it. *Edwards v. Supply Co.*, 150—175.

Advertisement and sale.—In absence of such a provision in instrument, not essential that mortgagor be notified of sale under mortgage. *Call v. Dancy*, 144—498.

Adjudication of bankruptcy of debtor, does not make mortgage debt immediately due, when by its terms it has not reached its maturity. *Martin v. Kirkpatrick*, 149—401.

After-acquired property.—Mortgage for pre-existing debt given by corporation to its officers, upon stock of goods continually being depleted and renewed, possession being retained by mortgagor, is void as to other creditors. *Edwards v. Supply Co.*, 150—173.

Description of after-acquired property intended to be subject to this mortgage, sufficient. *Lumber Co. v. Lumber Co.*, 150—284.

It may not be necessary to describe specifically the future property which it is intended the mortgage shall cover, but it is essential that mortgage shall show that it is intended to apply to after-acquired property of mortgagor. *Ibid*, 150—285.

Assignment of debt.—Where note secured by mortgage, is assigned,

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in equity, endorsement of the note passed title to it, with right to mortgage security as an incident. *Smith v. Godwin*, 145—242.

Chattel.—When property secured by chattel mortgage is not sufficient to pay debt, proper for court to render judgment that mortgagee recover the goods, instead of for possession and sale of goods. *Phillips v. Little*, 147—283.

Evidence in this case not sufficient to show parol mortgage. *White Co. v. Carroll*, 147—333.

One partner may execute chattel mortgage on partnership goods to secure firm debt. *Odom v. Clark*, 146—550.

Parol chattel mortgage between parties is good. *Ibid*, 146—551.

A chattel mortgage is a conditional sale of personal property as security for payment of a debt or performance of some other obligation. *Ibid*, 146—548.

Burden of proof upon him who claims verbal chattel mortgage, is by greater weight of evidence. *Ibid*, 146—549.

Description of property.—Description of after-acquired property intended to be subject to this mortgage, sufficient. *Lumber Co. v. Lumber Co.*, 150—284.

It may not be necessary to describe specifically the future property which it is intended the mortgage shall cover, but it is essential that mortgage shall show that it is intended to apply to after-acquired property of the mortgagor. *Ibid*, 150—285.

For purchase money.—Where second mortgagee advanced money with which property in question was purchased, and prior registered mortgage provided for lien upon after-acquired property, last mortgage would not have a superior lien. *Lumber Co. v. Lumber Co.*, 150—288.

Equity of redemption.—No agreement by parties can destroy equity of redemption. *Bunn v. Braswell*, 139—142.

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Purchaser of equity of redemption has same right to pay mortgage, redeem and have it cancelled that his grantor had. *Dickerson v. Simmons*, 141—325.

Language of consent decree that judgment by default "is so far modified as to declare defendant has equity to redeem," coupled with possession, is strong evidence that relation of mortgagor and mortgagee existed. *Bunn v. Braswell*, 142—113.

Trustor's action for redemption, under deed of trust, accrues when trustee takes possession, and is barred in ten years thereafter, in absence of claim or demand. *Bernhardt v. Hagamon*, 144—526.

Mortgagee who purchases equity of redemption direct from mortgagor must show that it was entirely fair. *Hauser v. Morrison*, 146—251.

Neither heirs of mortgagor, who has sold equity of redemption, nor personal representative, nor his wife, necessary parties in action to foreclose. *Bernard v. Shemwell*, 139—447.

Sale under second mortgage can only convey equity of redemption, and generally the proceeds should be applied to payment of that debt. *Moring v. Privott*, 146—566.

A sale of property, pursuant to power given in mortgage, in absence of fraud, is effectual to foreclose equity of redemption in mortgage. *Dunn v. Oettinger*, 148—282.

Mortgagor cannot debar himself from his equity of redemption by an agreement at time of execution of mortgage that the right to redeem shall be lost if money be not paid by a certain day. *Wilson v. Fisher*, 148—539.

When instrument, in form of a deed, provides after habendum clause, for a reconveyance by grantee upon payment to him of \$100 on a certain day, it is a mortgage, and marginal entry that if debt of \$100 was not paid, equity of redemption would be lost upon

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payment of \$50 by grantee, is void. *Ibid*, 148—540.

Mortgagee cannot foreclose equity of redemption by sale of property under power and purchase himself. *Rich v. Morisey*, 149—46.

Contracts for sale on installments are similar to mortgages, and equity is not destroyed because rent or installments of purchase price are not promptly paid. *Hicks v. King*, 150—371.

Foreclosure.—Neither heirs of mortgagor, who has sold equity of redemption; nor personal representative, nor his wife, necessary parties in action to foreclose. *Bernard v. Shemwell*, 139—447.

Mortgagor who sells equity of redemption, after prior mortgage, not necessary party to foreclose. *Ibid*, 139—446.

Where mortgagor of chattel left in possession has done nothing to jeopardize mortgagee's right, demand is necessary before action will lie at mortgagor's expense. *Smith v. French*, 141—1.

In action to recover mortgaged property, evidence of demand sufficient. *Ibid*, 141—1.

Where agent of mortgagee made no note of sale, bidder acquires no enforceable right if statute of frauds is set up. *Dickerson v. Simmons*, 141—325.

Advertisement of mortgage sale, with no written note showing price or purchaser, not a contract to convey. *Ibid*, 141—325.

Unconditional tender on day mortgage debt falls due, discharges lien of mortgage, though debt survives as personal liability. *Ibid*, 141—325.

Unaccepted tender, without suit to redeem, stops interest and costs, but lien of mortgage still subsists. *Ibid*, 141—325.

When power of sale in mortgage is given to mortgagee, "his executors" etc., upon default, and mortgagee dies leaving will under which executors qualify, power of sale

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vests in them.—*Scott v. Lumber Co.*, 144—44.

One in charge of mortgaged property as caretaker cannot resist possessory action of trustee, when mortgagor makes no defense nor contests in its own right the validity of mortgage. *Bruce v. Mining Co.*, 147—644.

Where debt is not paid at time fixed by decree of court it is not according to course of court to decree strict foreclosure or to order that plaintiff's bill (now action) be dismissed, but, in default of payment, to order sale of land conveyed by mortgage and apply proceeds to payment of encumbrance and costs, and pay surplus to mortgagor. *Bradburn v. Roberts*, 148—218.

Right of contribution can arise only after payment by one of the debtors, and mortgagee or assignee of bond cannot be required to defer enforcement of his security till debtors adjust their liabilities. *Lumber Co. v. Satchwell*, 148—317.

When mortgage and notes provided for payment of 200 bales of cotton, upon foreclosure the amount due on mortgage is value of cotton at market price when each installment fell due, with interest, subject to payments and set-offs, if any. *Walker v. Venters*, 148—390.

Improvements.—Mortgagee in possession only allowed for necessary improvements. *Alston v. McConnell*, 145—6.

While a mortgagee in possession is not generally entitled to pay for improvements, yet, where plaintiffs are asking equitable relief after so long a time they should account in diminution of rents for such enhancement in value of the property on account of permanent improvements put thereon by defendants. *Wilson v. Fisher*, 148—541.

Intended as deed.—Agreement to turn mortgage into deed in case of default, finds no favor in equity. *Bunn v. Braswell*, 139—143.

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Interest of mortgagee.—In absence of statutory provision, interest of mortgagee in personal property while mortgagor remains in possession, he also having an interest therein, is not the subject of levy by direct seizure, either under attachment or execution. *Bowen v. King*, 146—390.

Right of mortgagee in personal property in possession of mortgagor is that of creditor and his interest could only be levied on as provided in Revisal 767. *Ibid*, 146—390.

An easement acquired in mortgaged property, which is necessary and essential to full enjoyment of it, enures to benefit of mortgagee. *Latta v. Elec. Co.*, 146—301.

Mortgagee in possession.—Mortgage conveys legal title and mortgagee in possession necessarily has color of title at least, and when he conveys by deed to defendants who hold under known and visible lines and boundaries seven years, possession ripens title. *Stewart v. Loudermilk*, 147—584.

When mortgagee takes possession of land he must account for highest fair rent and he becomes responsible for all such acts or omissions as would, under the usual leases, constitute claims on an ordinary tenant. *Green v. Rodman*, 150—179.

Parol.—Where mortgage is given upon stock of goods, and parol lien upon after acquired goods, it is as good between the parties as if in writing. *White v. Carroll*, 146—233.

Purchase by mortgagee.—Mortgagee can not foreclose equity of redemption by sale of property under power and purchase himself. *Rich v. Morisey*, 149—46.

In setting aside deed to mortgagee of lands indirectly purchased by him at his own sale, under power in mortgage, court will require party, in whose behalf the equity is enforced, to account for purchase money, at least to extent that land has been exonerated from claims upon it. *Ibid*, 149—50.

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Purchase of land by mortgagee at tax sale does not extinguish equity of redemption. *Cauley v. Sutton*, 150—329.

Statute requiring actions to recover land sold for taxes to be brought within three years after execution of deed, does not apply to purchase made by mortgagee. *Ibid*, 150—330.

Where plaintiff alleged that mortgage debt had been paid and brought action to cancel mortgage and tax deed obtained by mortgagee, correct procedure was to ascertain amount due, if any, so that plaintiff could redeem or mortgage be foreclosed. *Ibid*, 150—330.

Reference to other conveyances.—Recital in subsequent registered mortgage that article was free of any encumbrance except (unregistered) chattel mortgage to seller of article, is not notice. *Piano Co. v. Spruill*, 150—169.

Rights of second mortgagee.—In absence of fraud or collusion between purchaser at sale under first mortgage, and holder of second mortgage, all right, title and interest of mortgagor and second mortgagee in land was extinguished by sale under first mortgage. *Dunn v. Oettinger*, 148—284.

Where second mortgagee advanced money with which property in question was purchased, and prior registered mortgage provided for lien upon after acquired property, last mortgage would not have a superior lien. *Lbr. Co. v. Lbr. Co.*, 150—288.

Note under seal, reciting that it is for balance of purchase price of land, and registered, does not attach to legal title a trust for payment, and where second mortgage for different debt is given, note is no prior lien. *Carpenter v. Duke*, 144—291.

MOTION IN THE CAUSE.

One may make motion in cause in which he has judgment, for order directed to defendant to make assessment under charter and by-

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laws, and court may enforce performance by order. *Perry v. Ins. Assn.*, 139—375.

Judge has no jurisdiction to hear a cause or make orders therein in different county from one in which it is pending, except by consent appearing of record, or where specially allowed by statute. *Bank v. Perego*, 147—296.

Final order in cause, in which rights are determined, should be made in the county at term of court, and generally a motion in cause other than for ancillary remedy should be made there. *Ibid*, 147—297.

When there was no service of process, judgment can be set aside by motion in the cause. *Simmons v. Box Co.*, 148—345.

MOTION TO DISMISS.

Upon motion to dismiss, judge should find facts, not simply that facts in affidavits are true. *Higgs v. Sperry*, 139—299.

Upon motion to dismiss for want of service, complaint not properly before the court. *Ibid*, 139—299.

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Generally.—Contract based upon consideration, for city to locate its city hall and market near plaintiff's property, to enhance its value, not enforceable. *Edwards v. Goldsboro*, 141—60.

Legislature can not confer upon private corporations power to tax, though it may doubtless create municipal corporations for that especial purpose when not forbidden by constitution to do so. *Smith v. School Trustees*, 141—151.

School districts are quasi-public corporations, included in term "municipal corporations," as used in Art. VIII, sec. 7, of constitution. *Ibid*, 141—143.

Counties, cities and towns are governmental agencies and subject to be changed or divided at will of legislature. *Jones v. Comrs.*, 143—60.

When abutting owner has established his right to sue as such for

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damages, neither municipal authorities nor legislature can confer an easement or right to use street as against property of citizen, without providing for compensation. *Staton v. R. R.*, 147—438.

Where section of proposed town was laid off on map, but it was cut off, conveyed to defendant and town quit-claimed its rights in streets and alleys, which were never used, action to compel defendant to open up streets is barred in ten years. *State Co. v. Finley*, 150—728.

Where city, in exercise of its police powers, constructs sewer so as to empty in small branch above home of plaintiff's intestate, and on account of odors arising the intestate contracted fever and died, no action lies. *Metz v. Asheville*, 150—750.

Distinction between acts performed by city for private and governmental purposes, stated. *Ibid*, 150—750.

Municipal corporations can only exercise such police powers as are granted by their charters, and all fair and reasonable doubts as to whether such powers have been so conferred are resolved by the courts against their being exercised. *S. v. Dannenberg*, 150—801.

Discretion of.—Courts are reluctant to interfere with municipal governments in exercise of discretionary powers, conferred upon them for public weal, and will never do so unless action should be so clearly unreasonable as to amount to oppressive and manifest abuse of discretion. *Rosenthal v. Goldsboro*, 149—134.

City need not give owner notice of its intention to cut trees in front of his property. *Ibid*, 149—135.

Action of aldermen in authorizing railroad company to use certain streets for railroad purposes, when statutory power is given, is not reviewable by the courts at instance of adjoining landowner. *Griffin v. R. R.*, 150—314.

Duties of.—Duty imposed upon corporations maintaining electric wires upon public highways, to use

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high degree of care for protection of travellers, is imperative. *Fisher v. New Bern*, 140—507.

Duty of cities to keep public streets in reasonably safe condition, and this is not suspended because private contractor is permitted to open streets to make water connections. *Kinsey v. Kinston*, 145—108.

If private individual cuts ditch in street, it is his duty to protect it, and if he fails, then city should see that it is protected. *Ibid*, 145—109.

City is negligent if it fails to exercise supervision and inspection of excavation made by citizen under license issued by it. *Ibid*, 145—109.

Closing a by-street is a ministerial act and within the proper act of the town authorities, who are charged with supervision of such matters, and remedy is not by appeal to the courts. *Trotter v. Franklin*, 146—555.

Duty of city to keep streets and sidewalks in safe condition, stated. *Revis v. Raleigh*, 150—353.

City should frequently inspect its streets, but court can not say as matter of law that failure to inspect for a week is negligence, this depending upon conditions. *Ibid*, 150—355.

Liability.—If city charter authorizes it to operate electric plant for general lighting purposes, it is liable for negligence of commission having charge or control of plant. *Fisher v. New Bern*, 140—506.

If city in ministerial character in management of property used it for its own benefit or profit and injures one, it is liable for negligence of its servants. *Ibid*, 140—506.

If grant is to city for purpose of private emolument, though public derives common benefit therefrom, city is regarded as private company. *Ibid* 140—506.

Action lies for injury caused by falling into hole in street not protected by light, railing or barriers. *Brown v. Durham*, 141—249.

City not liable civilly for failure to pass ordinances to preserve pub-

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lic health or otherwise promote public good. *Hull v. Roxboro*, 142—453.

City not liable for omission to enforce ordinances enacted under power granted in charter, or to see that they are properly observed by residents. *Ibid*, 142—456.

Contract for paving streets around public park, upheld. *Alvey v. Asheville*, 146—395.

One's right of ingress and egress to and from his lot is subject to right of town to grade and repair its streets in reasonably careful manner. *Jones v. Henderson*, 147—123.

Complaint alleging that town negligently and unskillfully graded its streets so as to injure plaintiff's ingress and egress to and from his lot, states a good cause of action. *Ibid*, 147—123.

Where a municipal corporation has authority to grade its streets, it is not liable for consequential damages, unless the work was done in an unskillful and incautious manner. *Dorsey v. Henderson*, 148—425.

In action for personal injuries sustained by blind man falling into stairway leading to cellar from street and open at each end, and such opening was authorized by city and permitted for forty years, their public necessity and usefulness rebuts any inference of negligence in permitting its existence. *Edwards v. Raleigh*, 150—279.

Distinction between acts performed by city for private and governmental purposes, stated. *Metz v. Asheville*, 150—750.

Mayor.—Mayor pro tem appointed under Rev., 2933, is authorized "to execute the duties" of mayor during his absence as fully as he could do if present. *S. v. Thomas*, 141—791.

Necessary expenses of.—Art. VII, sec. 7, of constitution is not in conflict with Revisal, 2977, and bond issue to pay floating debt of city contracted for necessary expenses is valid. *Wharton v. Greensboro*, 146—360.

Revisal, 2977, limiting loan of

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city's credit for debt, embraces all forms of debt not within the legitimate necessary expenses of city. *Ibid*, 146—359.

Bond issue by county to aid teachers training school is not for a private purpose, and legislature may authorize municipal corporations to apply their revenues and credit to legitimate purposes tending to general good of the community, though every taxpayer may not be directly benefited thereby. *Cox v. Comrs.*, 146—586.

Building of market house is a necessary expense for a town, and legislature may authorize creation of such a debt without vote of people. *Swinson v. Mt. Olive*, 147—612.

No limitation upon town taxation for necessary purposes except that imposed by statute, general or special. *Ibid*, 147—612.

Cost of maintaining streets is necessary expense, but if act authorizing bond issue for streets, including sidewalks, election should be had. *Comrs. v. Webb*, 148—122.

Where act authorizing bond issue for given purpose directs that question be submitted to voters, this amounts to a statutory restriction, though debt is properly classed as a necessary expense. *Ibid*, 148—123.

Municipal bonds for special purposes, issued by express authority of the legislature and approved by majority of qualified voters, are valid. *Cottrell v. Lenoir*, 148—138.

Constitution, Art. VII, sec. 7, prescribing limitations upon counties in contraction of debts for other than necessary expenses, should be construed in relation to each other and special tax authorized and voted for is not unconstitutional by reason of increase of property tax over constitutional equation between property and poll tax. *R. R. v. Comrs.*, 148—234.

Expense of public school system is not a necessary municipal expense. *Hollowell v. Borden*, 148—257.

Cost of maintaining streets to the extent and in manner required for well order and good government of

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a town is a necessary expense, and indebtedness incurred for such purpose does not come under prohibition of sec 7, Art. VII, of constitution. *Hendersonville v. Jordan*, 150—37.

Use of the term "state" or "county" in Art. II, sec. 14, of constitution, includes townships and imposes upon legislature the same limitations upon contraction of debts and imposition of taxes. *Wittkowsky v. Comrs.*, 150—95.

Bond issue for public improvements is not void because there were more than one kind of improvement to be done, but one ballot, and one ballot box. *Smith v. Belhaven*, 150—158.

A municipal building in cities the size of Raleigh is a recognized municipal necessity, and approval of majority of qualified voters is not necessary to validate a debt contracted to procure funds for its construction. *Hightower v. Raleigh*, 150—571.

It is within province of courts to determine what are necessary public buildings, and authority for determining kind of building needed and its cost is in legislative and municipal control. *Ibid*, 150—571.

New territory acquired.—Where act extending city limits omits certain words in its enrollment, so that boundaries can not be located, and amendatory act of 1908 covers same territory as that embraced in act of 1907, testimony of surveyor locating lines, is sufficient. *Lutterloh v. Fayetteville*, 149—67.

When municipal charter has been passed in accordance with Art. II, sec. 14, of the constitution, requiring aye and no vote to be taken on the several days, it is not necessary for act annexing territory thereto to be passed in like manner to confer authority for levy of taxes in new territory. *Ibid*, 149—68.

An act of annexation is valid which authorized the annexation of property, without consent of its inhabitants, to a municipal corporation, having a large unprovided for indebtedness, for payment of which

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the property included within the annexed territory became subject to taxation. *Ibid*, 149—69.

In action to restrain collection of taxes, where city limits are extended, perpetual injunction is proper remedy, and where judge refuses to enjoin the exercise of jurisdiction over the annexed territory, he must necessarily determine the case upon its merits. *Ibid*, 149—67.

Ordinances.—City not liable civilly for failure to pass ordinances to preserve public health or otherwise promote public good. *Hull v. Roxboro*, 142—453.

City not liable for omission to enforce ordinances enacted under power granted in charter, or to see that they are properly observed by residents. *Ibid*, 142—456.

Where charter of town provides that debt may be created after commissioners had passed an ordinance by "three-fourths vote of entire board," the words "entire board" mean all members of board in existence, and not all those provided for by charter. *Comrs. v. Trust Co.*, 143—110.

Reasonableness of an ordinance is for the court, the jury only being called in to find the facts, when in dispute. *Small v. Edenton*, 146—530.

An ordinance requiring all stationary awnings of certain class to be removed by certain day, and imposing a penalty for failing to so remove them, is reasonable. *Ibid*, 146—530.

All statutory restrictions of the use of property are imposed upon the theory that they are necessary for the safety, health or comfort of the public, but a limitation which is unnecessary and unreasonable can not be enforced, and this ordinance regulating placing of billboards is not enforceable. *S. v. Whitlock*, 149—543.

Street Improvements.—An assessment for street improvement according to frontage, as directed by statute, is valid. *Kinston v. Loftin*, 149—256.

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Statute authorizing assessment for street improvements, and providing notice that will enable property owner to appear in court and contest fairness of assessment, before it becomes a fixed charge on his property, does not deprive one of his property without due process of law. *Ibid*, 149—257.

As a general rule, the assessment of adjoining property by a city for paving streets and sidewalks by front foot rule will be upheld; but where in applying this rule there is a marked disproportion between burden imposed and any possible benefit, so that principle of equality has been ignored, court may interfere and afford relief. *Kinston v. Wooten*, 150—300.

In action to declare assessment upon property for sidewalk and street improvements upon the front foot rule, and to enforce lien by a sale of property, court should hear defendant's evidence, and assessment of \$447 on lot valued at \$1,500 is not excessive. *Ibid*, 150—302.

Power to grant franchise to business corporation over streets of city rests in legislature and can not be granted by city in absence of authority in its charter or general law. *Elizabeth City v. Banks*, 150—414.

Ultra vires acts.—Citizen in own behalf and that of all other taxpayers may sue in equity to enjoin governing body of city from making unauthorized appropriation of corporate funds. *Merrimon v. Paving Co.*, 142—539.

Citizen can not call upon courts to interfere with control of corporate property until he has first applied to corporation to take action, and it refuses, unless there is fraud, or threatened act is ultra vires. *Ibid*, 142—539.

NAME.

Mayor and corporation does not confer exclusive right to name. *Tobacco Co. v. Tobacco Co.*, 145—378.
See Corporations, name.

NEGLIGENCE.

National Banks.

See Banks and Banking.

Navigable Waters.

See Rivers and Streams; Hunting and Fishing; Nuisance, public.

Necessaries.

See Master and Servant, employment by necessity; Contracts, necessities; Married Women, contracts of.

NEGLIGENCE.

Generally.—Nonsuit proper where evidence fails to show that failure to receive medicine caused intestate's death. *Byrd v. Express Co* 139—273.

In action to recover for death of intestate, caused by failure to deliver medicine, evidence of surmise or conjecture, inadmissible. *Ibid*, 139—273.

Generally, all damages resulting from a single wrong, must be recovered in one suit. *Eller v. R. R.*, 140—140.

Neither usage nor custom, as general rule, will sanction or excuse an act which law condemns as negligent. *Stone v. Steamship Co.*, 139—195.

If one exposes himself rashly to obvious danger to rescue property, he can not recover. *Pegram v. R. R.*, 139—303.

What is negligence? *Fuller v. R. R.*, 140—480.

If city charter authorizes it to operate electric plant for general lighting purposes, it is liable for negligence of commission having charge or control of plant. *Fisher v. New Bern*, 140—506.

City in ministerial character in management of property used for its own benefit or profit, is liable for negligence of its servants. *Ibid*, 140—506.

Where plaintiff put his hand in sawdust box, under ordinary circular saw, requiring no special instruction, he can not recover for injury. *Mathis v. Mfg. Co.*, 140—530.

NEGLIGENCE.

Prima facie case of negligence made out for failure to promptly deliver death message. *Alexander v. Tel. Co.*, 141—75.

It is a negligent act to back a train into a yard without signals, where persons are accustomed to stand. *Ray v. R. R.*, 141—84.

If street car is moving at lawful speed, and one enters upon track, defendant required to use ordinary care, give signals, lower speed, and if it appear reasonably necessary, stop the car. *Davis v. Traction Co.*, 141—134.

In action for injury to traveler crossing street car track, if car is properly equipped and equipment used with reasonable promptness and care, defendant not liable. *Ibid.*, 141—134.

No one is legally liable for accidental injury. Injury resulting from negligence is not an accident. *Davis v. Traction Co.*, 141—141.

No presumption of negligence arises simply because accident occurs. *Isley v. Bridge Co.*, 141—220.

Where facts are undisputed and only one inference can be drawn from them, negligence is question of law for court. *Ibid.*, 141—221.

Timetable and train sheets used on day of injury, for death of engineer, competent in action to show movements of trains. *Stewart v. R. R.*, 141—254.

If facts proved establish the more reasonable probability that defendant has been guilty of actionable negligence, case must be submitted to jury, though possibility of accident may arise on the evidence. *Fitzgerald v. R. R.*, 141—530.

Master's acquiescence in use of an appliance for some purpose other than that for which intended, puts him in same position as if originally furnished for that purpose. *Wallace v. R. R.*, 141—646.

Negligence is the failure to exercise the proper degree of care in performance of some legal duty, which one owes another, causing unintended damage. *Foot v. R. R.*, 142—52.

Employee justified in obeying ex-

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press order of superintendent, though told by assistant of superintendent to perform work otherwise. *Liles v. Lbr. Co.*, 142—39.

Duty of servant in coupling cars, stated. *Ibid.*, 142—39.

It is negligence for cars to be left on spur track on down grade, where they run down into other cars, against intestate who was on track at time, and no one present to give warning. *Hudson v. R. R.*, 142—198.

When one is guilty of negligent act, causing injury, he can not be excused because damage in particular case was more serious than he anticipated. *Ibid.*, 142—203.

Where conductor signalled engineer ahead to put flat car on sidetrack, and at same time intestate stepped across flat car, it pulled loose and he fell and was killed, nonsuit proper. *Jones v. R. R.*, 142—207.

Where act causing injury is in itself lawful, liability depends not upon particular result that may flow from it, but upon ability of prudent man to see that injury will probably result. *Ibid.*, 142—208.

Quality of particular act of negligence immaterial, so that it is sufficient to produce injury. *Knott v. R. R.*, 142—242.

Direct evidence of negligence not required, but same may be inferred from acts and circumstances, and if facts proved establish more reasonable probability that defendant has been guilty of actionable negligence, case should be submitted to jury. *Bird v. Leather Co.*, 143—283.

Evidence in this case for injuries from blasting in careless manner and large rock crashing through plaintiff's house on account thereof, is for jury. *Kimberly v. Howland*, 143—398.

Where one could not know at time he fired blast that feme plaintiff was lying in bed at her home in pregnant condition, and he could not foresee exact consequences of his act or form of injury inflicted, he ought to have known that he

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was subjecting plaintiff to danger and to have taken proper precautions to guard against it. *Ibid*, 143—399.

In action for damages through defendant's negligence, plaintiff must show his employment; and if employed by one of two corporations in hands of same receiver, and he is injured while working for other under instructions of receiver, evidence of employment is sufficient for jury in action against corporation for whom he was working when injured. *Britt v. R. R.*, 144—242.

Where railroad undertakes to load logs on its cars, which it is duty of another corporation to do, it assumes liability for negligent act of employee of such other corporation, not independent and intervening acts to avoid liability, but which, concurring with other negligent acts proximately causing injury, focalize into one proximate cause producing the result. *Ibid*, 144—243.

Plaintiff must show that defendant committed a negligent act and it was proximate cause of injury. The two facts must coexist and be established by weight of evidence. *Crenshaw v. St. Ry. Co.*, 144—320.

Kind of proof necessary in action for negligence. *Ibid*, 144—320.

Additional damages are not recoverable in a subsequent action after judgment has been entered, on account of same injury, between same parties. *Painter v. R. R.*, 144—437.

Facts in this case bring it within that class of cases where one has been held liable to another in absence of any contractual or other relation between them. *Kesterson v. R. R.*, 146—280.

A telephone company owes the highest degree of care to select sound poles and place them securely, under usual conditions, having regard to rain, snow and winds. *Harton v. Tel. Co.*, 146—434.

Where one sustains a serious injury to his person and immediately his eyesight is impaired, jury may

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find a causal connection between the two injuries. *Shaw v. Mfg. Co.*, 146—241.

Where sheriff wrongfully seized machinery and it was injured by freezing, caused by his lack of ordinary care, an actionable wrong is established. *Gay v. Mitchell*, 146—510.

It is actionable negligence for defendant to improperly moor a barge in its canal, so as to injure plaintiff's vessel while being towed by defendant. *Gillikin v. Canal Co.*, 147—40.

Large barge negligently moored to bank of canal, so that it floats out into canal, inflicting serious injury to plaintiff's vessel, is within meaning of term "obstruction." *Ibid*, 147—41.

Evidence is competent tending to show that since the injury complained of, and not before, plaintiff has suffered from nervousness, etc., as corroborative of expert evidence of a physician as to effects of bodily injury received. *Brown v. R. R.*, 147—137.

When conductor on street car was required to take switch and he knew that on account of heavy sleet car was frequently not lighted, and if jury find that under existing conditions care for safety of passengers required him to remain at switch till other car passed, this would be actionable negligence if collision occurred. *Briggs v. Trac-tion Co.*, 147—394.

If defendant owes a duty, but not to plaintiff, action will not lie in his favor even if there is a breach of duty. *Morrow v. R. R.*, 147—628.

In action for personal injuries received by being hit by a runaway horse, where motorcycle and engine stopped 150 yards before meeting horse, and when opposite the cycle the horse shied and ran, non-suit was proper. *Long v. Warlick*, 148—33.

Actionable negligence exists only when the one whose act causes or occasions the injury owes to the injured party a duty, created either by contract or operation of law,

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which he has failed to discharge. *Briscoe v. Lighting Co.*, 148—404.

When a passenger falls overboard, master and crew should make every reasonable endeavor consistent with safety of the ship and passengers to rescue him after discovering his situation. *Pate v. Steamboat Co.*, 148—572.

If there is any evidence tending to show that death of intestate was the result of negligence of defendant, it should have been submitted to jury. *Thomson v. R. R.*, 149—156.

Traction engine may lawfully traverse public highway, and when it breaks down on highway, it becomes the duty of owner to remove it within a reasonable time, this depending upon circumstances. *Davis v. Thornburg*, 149—234.

In action upon delayed message, it is not for defendant to say that its operator did not anticipate that his refusal to receive and transmit message would cause plaintiff mental anguish. Every man in law is presumed to intend any consequence which naturally flows from an unlawful act, and is answerable to private individuals for any injury so sustained. *Cordell v. Tel. Co.*, 149—413.

When one presents message at telegraph office during office hours, to which there is no lawful objection, and pays or tenders usual charges therefor, it is duty of operator to receive and promptly transmit it, and refusal to do so without legal excuse is actionable. *Ibid.*, 149—408.

When conductor went on top of freight train to signal engineer to stop at flag station, and he immediately stopped in such a jerking way that conductor was thrown between the cars and injured, he may recover. *Bull v. R. R.*, 149—429.

Tugboat is not authorized to run into marine railway unnecessarily and negligently, though railway was illegally placed and constructed and was a public nuisance. *Ives v. Gring*, 150—138.

If defendant failed to exercise ordinary care in attempting to deliver death message, and if by exer-

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cise of such care message could have been delivered in time for plaintiff to have reached his home and attended funeral of his father, there was negligence. *Willis v. Tel. Co.*, 150—324.

It is culpable negligence which makes master liable to servant, not mere error of judgment in selection of appliances. *Nail v. Brown*, 150—535.

Abrogation of rule.—Rule is waived when habitually violated to employer's knowledge, and he knew of its nonobservance. *Biles v. R. R.*, 139—528.

In action against railroad for personal injuries, where rule was habitually violated to knowledge of defendant, or it was so frequently and openly violated for such a length of time that it could, by exercise of ordinary care, have ascertained its violation, rule is considered in law as abrogated. *Ibid.*, 143—78.

"Abrogation of rule," charge correct. *Ibid.*, 143—78.

Principle that violation of rule made by employer for employee's protection, when proximate cause of injury bars recovery, does not obtain when it is habitually violated to knowledge of employer, or so frequently and for such a length of time that it could, by exercise of ordinary care, have ascertained its nonobservance. *Haynes v. R. R.*, 143—154.

An order or rule given by conductor to those working under him, should be given while he was acting as vice-principal toward employee and to govern his future conduct; with expectation and intent that it should be observed. *Smith v. R. R.*, 147—609.

Charge on abrogation of rules, approved. *Ibid.*, 147—610.

A rule which has been habitually violated, with knowledge or acquiescence of master, actual or implied, is almost universally regarded as waived or abrogated. *Bordeaux v. R. R.*, 150—531.

Accident.—Accident carries with it no presumption of employer's

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negligence. *Shaw v. Mfg. Co.*, 143—131.

Res ipsa loquitur does not apply where gangway built by competent builder, upon proper plan, of good material, safe for purposes for which intended, was tested by actual use, up to few minutes before plank fell. *Ibid*, 143—131.

When a thing which causes injury is shown to be under management of defendant, and accident is such as in ordinary course of things does not happen, if those who have management use proper care, it affords reasonable evidence, in absence of explanation by defendant, that accident arose from want of care. *Bird v. Leather Co.*, 143—283.

Where railroad company caused lumber and other freight to be piled on its right of way, and, while plaintiff was standing on right of way nearby, a backing engine struck a scantling, seriously injuring plaintiff, and jury found that both parties were negligent, he can not recover. *Muse v. R. R.*, 149—451.

When plaintiff was injured while unloading rails from flat car, caused by rail rebounding in unusual way and striking him, and method employed for unloading was safest way, and car had been properly loaded and sufficient help furnished in unloading, the injury was an accident. *Lassiter v. R. R.*, 150—485.

Act of God.—Any accident due directly and exclusively to neutral cause without human intervention, which by no human foresight, pains or care reasonably to have been expected could have been prevented, is said to be caused by the act of God. *Briggs v. Traction Co.*, 147—393.

Attractive premises.—No action lies for injuries sustained by a trespasser passing through a private alleyway and fell into a pit of hot water and was scalded, and doctrine of alluring and attractive buildings and machinery to children does not apply. Rule stated when action would lie. *Briscoe v. Lighting Co.*, 148—414.

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Blasting.—Evidence of negligent injury to house by blasting, sufficient for jury. *Settle v. R. R.*, 150—644.

Children.—Employment in a factory of a child under twelve, with knowledge, or failing to have certificate from parents, is very strong evidence of negligence in action for injury. *Rolin v. Tobacco Co.*, 141—300.

Child under twelve not guilty of contributory negligence. *Ibid*, 141—300.

Contributory negligence of child to be measured by age and ability to discern danger. *Ibid*, 141—300.

In action for injuries to boy twelve years old, evidence of dangerous character of machine, knowledge of employer that persons at or near plaintiff's age had been injured before, and one since injury complained of, in operating similar machines and under same conditions, is competent. *Leathers v. Tobacco Co.*, 144—330.

It is negligence per se to employ children under twelve in factories. *Ibid*, 144—330.

Duty of one who employs child, under statutory age, to furnish safe machinery and instruct him in its use when dangerous, and child is only required to use such care as one of his years and experience may be expected to possess. *Ibid*, 144—331.

It is presumed that child, working in factory under statutory age, is incapable of committing negligence, but this may be rebutted. *Ibid*, 144—331.

It is negligence per se to employ child under twelve in mill. *Starnes v. Mfg. Co.*, 147—561.

Child ten years old employed to sweep upstairs in cotton mill, went own stairs and in picking cotton out of machine had fingers cut off, he may recover. *Ibid*, 147—562.

Employment of child under twelve in factory constitutes actionable negligence when it is shown that injuries were sustained as consequence of wrongful employment, but not if he die of heart disease,

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or by willful and malicious act of servant in knocking him against machine. *Ibid*, 147—563.

An infant of fourteen is presumed to have sufficient capacity to be sensible to danger and to have power to avoid it, and this presumption will stand till rebutted by clear proof of absence of such discretion as is usual with infants of such age, and where he jumped from rapidly moving train and was injured, he can not recover. *Baker v. R. R.*, 150—564.

Continuing.—Continuing negligence to rapidly run train through populous settlement at night, without headlight or other proper signal. *Heavener v. R. R.*, 141—245.

Injury from use of defective coupler under express order of superintendent is *causa causans*, and a continuing negligence. *Liles v. Lbr. Co.*, 142—39.

Failure to have sufficient lights upon wharf, where passengers alight, when proximate cause of injury, is continuing negligence. *Ruffin v. R. R.*, 142—120.

After adoption of automatic couplers, dead bumpers were unnecessary and dangerous; hence their retention is a defective appliance and a continuing negligence. *Dermid v. R. R.*, 148—193.

Contributory.—Where jury find plaintiff's intestate guilty of contributory negligence, unnecessary to consider exception to refusal of defendant's prayer as to contributory negligence. *Edwards v. R. R.*, 140—49.

One who attempts to cross unmolested track without first looking, is guilty of contributory negligence. *Cooper v. R. R.*, 140—209.

Where intestate drove in covered wagon on crossing without stop and track could be seen down for five hundred feet, sufficient for issue of contributory negligence. *Ibid*, 140—209.

Employee can not recover when he fails to use an instrument which if used would have averted the injury. *Horne v. Power Co.*, 141—50.

Duty of one dangerously near

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track to look and listen may be so qualified by facts as to require question of contributory negligence submitted to jury. *Ray v. R. R.*, 141—84.

Where testimony relied upon to sustain contributory negligence is conflicting, refusal to charge jury to answer second issue "Yes," proper. *Davis v. Traction Co.*, 141—134.

If defendant furnished shield for saw, allegation of negligence is fully met, and if jury so find they should answer first issue "No," plaintiff's refusal to use hood is his own fault. *Jones v. Tobacco Co.*, 141—204.

Child under twelve not guilty of contributory negligence. *Rollin v. Tobacco Co.*, 141—300.

Contributory negligence of child to be measured by age and ability to discern danger. *Ibid*, 141—300.

Contributory negligence should not be submitted where answer does not set out facts and default of plaintiff. *Watson v. Farmer*, 141—452.

Where evidence conflicting, improper to charge jury to answer issue as to contributory negligence "Yes." *Hemphill v. Lbr. Co.*, 141—487.

Where evidence is conflicting as to safest way to make coupling, not error to refuse to hold intestate guilty of negligence because he selected most dangerous way. *Wallace v. R. R.*, 141—647.

Omission to submit issue of contributory negligence when pleaded and there is evidence to sustain plea, not reversible error when court fully explained several phases of testimony relied on to show it, and defendant got benefit of such testimony. *Ruffin v. R. R.*, 142—120.

Use of word "directly" instead of "proximately" with reference to contributory negligence, not prejudicial. *Ibid*, 142—120.

Conductor guilty of negligence, where wind blew lantern out on dark stormy night and he did not light it, but felt his way along platform with his feet and fell down

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steps which he knew were there. *Beard v. R. R.*, 143—137.

In action for personal injuries in running into switch, to meet defense of contributory negligence in alleged violation of rule requiring engine to be under control in approaching switch without a light, evidence of other employees that rule was constantly violated, length of decedent's run, schedule prescribed, number of switch lights, usual condition, etc., competent. *Haynes v. R. R.*, 143—154.

Where orders are given engineer by general officers of company, requiring him to run in a different manner from that prescribed in rules, and other trains of same class are run to their knowledge in violation of rules, negligence can not be imputed to engineer though he does not follow general rules. *Ibid.*, 143—154.

Where freight train took siding for another train to pass, and it was flagman's duty after taking siding to lock switch to main line, stand nearby and give necessary signals to approaching train, he did not perform this duty and it was immediate cause of collision in which he lost his life, nonsuit proper. *Holland v. R. R.*, 143—435.

Employee assumes no risk in proper use of defective appliances after notifying employer thereof for a reasonable time, who promises to remedy defect; but he must use them with proper regard to their known condition, and failing in this, he would be guilty of contributory negligence. *Britt v. R. R.*, 144—243.

It is presumed that child, working in factory under statutory age, is incapable of committing negligence, but this may be rebutted. *Leathers v. Tob. Co.*, 144—331.

Where facts are not capable of more than one inference, proximate cause is one of law; but where injury to child under twelve, employed in violation of statute, it is negligence per se on defendant's part and there is no evidence from which it could be inferred that he was negligent, and proximate cause

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should not be submitted to jury. *Ibid.*, 144—330.

Where plaintiff knew that street had been excavated in front of house he intended to visit, in the night time, and he fell and was injured by going across private lots, he was negligent. *Austin v. Charlotte*, 146—338.

A plaintiff can not be said to have contributed to his own injury unless he has failed to exercise that degree of care which a man of ordinary prudence would use for his own safety in the same or substantially similar circumstances, and, further, unless his want of care has proximately contributed to causing the injury of which he complains. *Miller v. R. R.*, 144—548.

In action for injuries to one working on or near track by moving train, charge upon contributory negligence proper. *Brown v. R. R.*, 144—634.

Negligent act of plaintiff is not contributory unless the proximate cause; and, though plaintiff may have been negligent in going on track, when he has become helpless and down, liability of defendant attaches when it negligently fails to avail itself of last clear chance. *Sawyer v. R. R.*, 145—24.

Employee is not negligent in boarding moving train, in sight of engineer, who opened throttle of engine and caused plaintiff to be thrown under car. *Daniel v. R. R.*, 145—51.

Evidence of contributory negligence in this case for injuries in making running switch, sufficient for jury. *Allen v. R. R.*, 145—218.

Doctrine of proximate cause should be included in prayer for instructions as to contributory negligence. *Boney v. R. R.*, 145—248.

When one has waited at public crossing for freight train to pass, is struck by passenger train, which was not heard or seen for the noise, smoke and fog, contributory negligence is for jury. *Morrow v. R. R.*, 146—14.

Where one is struck by engine, backing over crossing, without

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lights, signals or other warnings, in thickly settled community, it is negligence, and without other evidence contributory negligence does not arise. *Gerringer v. R. R.*, 146—32.

Duty of servant to be careful and guard against accidents, and charge upon contributory negligence approved. *Avery v. Lbr. Co.*, 146—596.

When one is injured while riding in a dangerous position upon a railroad car he is prima facie guilty of negligence which will bar recovery, and the burden is on him to show the injury was not the result of his negligence. *Wagner v. R. R.*, 147—323.

Where passenger sat on steps of car when there was plenty of room inside, and he stepped or fell off and was injured, he was negligent as matter of law. *Ibid*, 147—324.

Where passenger is injured by riding on platform, charge which omits the question of plaintiff's negligence in exposing himself to danger in the first instance, is erroneous. *Ibid*, 147—327.

Persons before entering upon a railway track must look and listen for approaching trains. *Royster v. R. R.*, 147—350.

Failure to sound bell or whistle, or unusually fast running, will not render defendant liable to one who actually knows train is approaching. *Ibid*, 147—351.

When train has stopped at station and plaintiff is thrown from platform of car in alighting before she is given reasonable opportunity to safely step off, there is no contributory negligence. *Smith v. R. R.*, 147—451.

Where brakeman stepped in center of track, between rails, to catch engine moving slowly toward him, and he fell and was killed, his contributory negligence was for jury. *Smith v. R. R.*, 147—610.

When conductor gave order to engineer to cut loose engine from train, and to do this it was necessary to back and take out slack, and conductor immediately stepped between cars to couple air-brake

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hose and was killed he is not entitled to recover. *Dermid v. R. R.*, 148—184.

Where one not only chose to unnecessarily encounter an obvious danger, but he selected a method of doing the work known to him to be dangerous, when he could have performed the same act with reasonable safety by following the known method usual amongst brakemen, he can not recover. *Ibid*, 148—183.

Ordinarily, jumping on or off a moving car is such contributory negligence as bars recovery, but this principle does not apply where conductor on top of rapidly moving car, which has been derailed, jumps and he is killed. *Dortch v. R. R.*, 148—579.

Where one goes upon a much frequented crossing, with his view obstructed, and is struck by backing engine, running at greater speed than allowed by city ordinance, and without warning, he may recover. *Inman v. R. R.*, 149—126.

Where one would have had a safe way home by going about ninety feet around train, but instead he crossed between two cars chained together on a live track in constant use, and he is injured, he can not recover. *Beck v. Ry.*, 149—168.

If the negligence of the employer and a fellow employee concurs in producing an injury, the injured employee can recover of either if he himself is free from blame. *Wade v. Contracting Co.*, 149—180.

Prayer for instructions which asks court to direct findings of jury upon contributory negligence in favor of defendant, upon whom is burden of proof, properly refused. *Britt v. R. R.*, 148—42.

Decedent in apparent possession of his faculties, was walking along crossties and approaching the train which killed him, and a few yards from trestle, facing a signboard warning him to keep off of bridge 192 feet long and 20 feet above water, and decedent knew train was due and about to enter bridge,

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he can not recover. *Strickland v. R. R.*, 150—10.

Burden of defense of contributory negligence is upon defendant to set up and prove it on trial, and it is proper to refuse to charge as matter of law that plaintiff was guilty of such negligence. *Matthews v. Peterson*, 150—138.

Charge as to duty of servant to use due care for his own safety, approved. *Midgette v. Mfg. Co.*, 150—347.

Issue of contributory negligence properly withdrawn, in absence of such testimony or eliciting anything from plaintiff's evidence to make good this averment. *Ibid*, 150—352.

While a servant may not recover when he has voluntarily placed himself in a dangerous position, which is not his post of duty, yet he may recover for injuries received while sitting down, at his post, ready to perform his full duty, instead of standing up as directed. *Redman v. R. R.*, 150—405.

Standing up, under certain circumstances, or getting up from one's seat for a natural purpose, or going for a drink of water or the like, is not negligence per se, but question should, as a rule, be referred to jury under proper charge. *Suttle v. R. R.*, 150—673.

Where plaintiff escorted her husband to station and went upon platform of car with him, and finding car door locked, she stood on platform two minutes and was injured in collision which occurred there, she may recover. *Fortune v. R. R.*, 150—698.

Defective streets.—Action lies for injury caused by falling into hole in street not protected by light, railing or barriers. *Brown v. Durham*, 141—249.

It is not for court to draw inference that officers of a city had actual knowledge of defect in bridges because of length of time it had continued. This is for jury. *Brewster v. Elizabeth City*, 142—10.

Duty of cities to keep public streets in reasonably safe condi-

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tion, and this is not suspended because private contractor is permitted to open streets to make water connections. *Kinsey v. Kinston*, 145—108.

When city issues permit to plumber to lay water pipes in street and dig ditches therefor, it is expressly charged with knowledge of the character of work and its dangers to those who use the street. *Ibid*, 145—109.

If private individual cuts ditch in street, it is his duty to protect it, and if he fails, then city should see that it is protected. *Ibid*, 145—109.

City is negligent if it fails to exercise supervision and inspection of excavation made by citizen under license issued by it. *Ibid*, 145—109.

Where plaintiff knew that street had been excavated in front of house he intended to visit, in the night time, and he fell and was injured by going across private lots, he was negligent. *Austin v. Charlotte*, 146—338.

If town permits steps to be built on street so that it amounts to an actionable wrong, it can not be rendered lawful by lapse of time. *White v. New Bern*, 146—449.

Where wrongful obstruction of street by steps has existed thirty years, city is presumed to have knowledge of it. *Ibid*, 146—447.

A city does not guarantee its streets to be safe, but it must provide a reasonably safe way for travel, and its liability to one for injury in passing along arises where it was negligent. *Ibid*, 146—449.

In absence of statute, city is under no legal obligation to light its streets, and the placing of lights is in discretion of its authorities. *Ibid*, 146—451.

Duty to repair streets and keep them in good condition is ministerial, and when servants of corporation undertake to perform this duty they must exercise reasonable care, or town will become liable for any injury to owners of abutting property caused by their negligence. *Jones v. Henderson*, 147—125.

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Where town is lawfully engaged in fixing grade and paving its streets, if work was done in a proper manner, although plaintiff was damaged thereby, it would be *damnum absque injuria*. *Ibid*, 147—123.

In action for personal injuries sustained by blind man falling into stairway leading to cellar from street and open at each end, and such opening was authorized by city and permitted for forty years, its public necessity and usefulness rebuts any inference of negligence in permitting its existence. *Edwards v. Raleigh*, 150—279.

Duty of city to keep streets and sidewalks in safe condition, stated. *Revis v. Raleigh*, 150—353.

If city had no actual notice of dangerous condition existing, plaintiff must show that by exercise of that degree of care and performance of duty of inspection of streets it would have known it. *Ibid*, 150—354.

City should frequently inspect its streets, but court can not say as matter of law that failure to inspect for a week is negligence, this depending upon conditions. *Ibid*, 150—355.

Electric wires.—Broken live wire hung on electric pole, six feet from ground, in frequented part of city, where it stays two days, is evidence of negligence. *Fisher v. New Bern*, 140—506.

Duty imposed upon corporations maintaining electric wires upon public highways, to use high degree of care for protection of travelers, is imperative. *Ibid*, 140—507.

Duty of those who place above streets of city wires charged with deadly current of electricity, or liable to become so charged, to exercise utmost care, so far as human foresight can reach, in construction and maintenance. *Horne v. Power Co.*, 144—375.

Evidence of.—Speed in excess of that prescribed by ordinance, evidence of negligence. *Davis v. Traction Co.*, 141—134.

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See also *Wilson v. R. R.*, 142—333; *Smith v. R. R.*, 145—105.

Collision in daytime is presumption of negligence. *Stewart v. R. R.*, 141—254.

Where there is a collision or derailment, negligence presumed. *Hemphill v. Lbr. Co.*, 141—488.

Broken live wire hung on electric pole, six feet from ground, in frequented part of city, where it stays two days, evidence of negligence. *Fisher v. New Bern*, 140—506.

Employment in a factory of a child under 12, with knowledge, or failing to have certificate from parents, very strong evidence of negligence in action for injury. *Rolin v. Tobacco Co.*, 141—300.

See also, *Leathers v. Tobacco Co.*, 144—330.

Failure to notify sender of a telegram of its non-delivery, evidence of negligence. *Carter v. Tel Co.*, 141—374.

Where defendant recommended to shippers the use of 10 penny nails in securing standards on flat-cars, use of 8 penny nails, as evidence of negligence, is for jury. *Wallace v. R. R.*, 141—647.

Fire catching on foul right-of-way is negligence and plaintiff may show that fire caused by live coal from fire-box, though complaint says spark came from smoke-stack: *Knott v. R. R.*, 142—241.

In action for negligent burning, evidence that sparks flowed from engine every night between February 15th and April 15th and fired right-of-way, competent. *Ibid*, 142—243.

Duty of railroad to use reasonable care to provide and maintain safe switch and keep it properly adjusted, and where it was not so adjusted and set to main track, and injury occurs, negligence is presumed. *Haynes v. R. R.*, 143—154.

Mere killing by a railroad train of an employee engaged in its operation, raises no presumption of negligence. *Jones v. R. R.*, 144—79.

Duty of street railway company

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to keep its track properly constructed and in good condition, also its cars and motive power, and to operate same by competent persons and in proper manner. Where a derailment is shown, a prima facie case is made out and defendant must show that injury was accidental. *Overcash v. Electric Co.*, 144—572.

The terms "prima facie," "presumptions of negligence," and "burden of issue," distinguished. *Furn. Co. v. Express Co.*, 144—639.

Making running switch is not negligence per se, when detached moving car has brakeman on it and it is under control. *Allen v. R. R.*, 145—214.

Evidence that plaintiff's intestate was in good physical condition upon going on his run one morning, that a wreck occurred which derailed his car, throwing him against the side of it and making small bruise in his back, causing pneumonia from which he died twelve days later, sufficient for jury. *Cox v. R. R.*, 147—355.

Failure to give warning, while not negligence per se as to pedestrian using track for his own convenience, may be evidence of negligence as to him when train is run at night without headlight. *Morrow v. R. R.*, 147—626.

When goods were "burned, stolen or destroyed," relieves carrier of penalty for failure to deliver, but burden of this defense is upon carrier. Mere proof of loss presumes negligence, but does not presume that they were "burned, stolen or destroyed," so as to relieve carrier of this proof. *Robertson v. R. R.*, 148—325.

Proof of injury to stock in possession of carrier makes a prima facie case of negligence sufficient to carry case to jury, and after hearing defendant's evidence as to how injury occurred, it is for jury to say whether it was due to defendant's negligence. *Jones v. R. R.*, 148—452.

Where there is proof that animal was injured while in posses-

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sion of carrier, prima facie case of negligence is made out so as to require submission of matter to jury. *Ibid*, 148—583.

Evidence that sparks were emitted from engine and they set fire to timber, makes a prima facie case for plaintiff, but only to extent of being evidence sufficient to carry case to jury and warrant a verdict for plaintiff, if jury should find ultimate or crucial fact that fire was caused by defendant's negligence. *Cox v. R. R.*, 149—118.

It is actionable negligence for engine to be backed at night against a line of 22 cars with such force as to knock them $1\frac{1}{2}$ car lengths and injured flagman, who was not in fault. *Meacham v. R. R.*, 149—154.

It is negligence to operate a train at night without a headlight, and evidence in action for wrongful death sufficient. *Thompson v. R. R.*, 149—157.

Where one bought a ticket from defendant's agent at Sanford, for passage of plaintiff from Kittrell to Sanford, and agent at Sanford delayed notifying agent at Kittrell to give ticket to plaintiff for six days, this was actionable negligence. *Reeves v. Railroad*, 149—247.

Excessive speed.—If street car is moving at speed in excess of that prescribed by ordinance, so that signals cannot be given nor appliances used, defendant liable for injury. *Davis v. Traction Co.*, 141—134.

Speed in excess of that prescribed by ordinance, evidence of negligence. *Ibid*, 141—134.

See also:—*Smith v. R. R.*, 145—105.

Speed allowed by ordinance may become excessive upon certain occasions. *Davis v. Traction Co.*, 141—140.

Fires.—In action for fire caused by stove pipe being run through ceiling, proper to charge that if work was constructed by competent builder, of safe material, in safe

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manner, was not negligently permitted to become defective, maintenance of flue was not negligence, even if it caused fire. *Fowle v. R. R.*, 147—502.

Free agent.—Where pole was plowed too near to and it fell after heavy rain, it was propped up by a third person and it again fell and injured plaintiff, the original negligent act was not the proximate cause. *Harton v. Tel. Co.*, 146—439.

Where one is negligent, and another, moving independently, comes in and either negligently or maliciously so acts as to make my negligence injure a third person, the "free agent" is liable. *Ibid*, 146—439.

Injury in this case arises from act of intervening agent. *Fanning v. White*, 148—544.

Fright.—Fright, unaccompanied by physical injury, not an element of damage; but where fright occasions physical injury directly traceable to it, action lies for injury resulting from negligent act. *Kimberly v. Howland*, 143—399.

Where wife was in bed heavy with child, and a rock crashed through roof of her home, greatly shocking her nervous system and nearly causing a miscarriage, though it did not strike her, and she has never recovered from its effects, she may recover for negligent act, whether wilful or otherwise. *Ibid*, 143—399.

Gross.—It is gross negligence to start a vessel upon a voyage without inspection or trial, upon assumption that defendant had properly repaired it. *Bell v. Machine Co.*, 150—113.

Where night message announcing serious illness of plaintiff's niece, was filed Saturday night at 8 o'clock, and was not delivered till Monday morning at 9 o'clock, this was gross negligence. *Pierson v. Tel. Co.*, 150—561.

Making flying switches on railway tracks and sidings running

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across and along streets of populous towns, is per se gross negligence. *Vaden v. Railroad*, 150—702.

Imputed.—Imputed negligence not attributable to one in conveyance as guest of another, who is not driving at time or in charge of conveyance. *Baker v. R. R.*, 144—37.

Last clear chance.—Duty of one dangerously near track to look and listen may be so qualified by facts as to require question of contributory negligence submitted to jury. *Ray v. R. R.*, 141—84.

Negligent act of plaintiff is not contributory unless the proximate cause; and, though plaintiff may have been negligent in going on track, when he has become helpless and down, liability of defendant attaches when it negligently fails to avail itself of last clear chance. *Sawyer v. R. R.*, 145—24.

Discretionary with judge to submit last clear chance under separate issue, or upon issue of contributory negligence. *Ibid*, 145—24.

Evidence insufficient upon which to submit issue as to last clear chance. *Allen v. R. R.*, 145—217.

Burden of proof upon issue of last clear chance is upon plaintiff, and evidence of negligent drowning of passenger is sufficient for jury under that issue. *Pate v. Steamboat Co.*, 148—574.

Licensees.—Railroad carrying on its cars vendors of fruits for sale to passengers does not invite or induce the public to enter them, and entry of one for this purpose is a permissive license and he took the risk incident to movement of train, and in absence of wanton injury, nonsuit proper. *Peterson v. R. R.*, 143—260.

Where railroad company caused lumber and other freight to be piled on its right-of-way, and, while plaintiff was standing on right-of-way near by, and a backing engine struck a scantling, seriously injuring plaintiff, and jury found that

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both parties were negligent, he can not recover. *Muse v. R. R.*, 149—451.

If owner of premises in their lawful use, and trespasser while on premises, both fail to act up to standard of duty fixed by law, and trespasser is injured and such failure continues up to moment of impact, he cannot recover. *Ibid*, 149—451.

Per se.—Negligence per se to employ child under 12 in mill. *Starnes v. Mfg. Co.*, 147—561.

Proximate cause.—Where plaintiff injured in performance of duty, as proximate consequence of defective appliance, defense of assumption of risk not open to defendant. *Biles v. R. R.*, 139—528.

In action for damages for collision, plaintiff must show that engineer's not stopping train sooner, was proximate cause of injury. *Kearns v. R. R.*, 139—470.

Violation of known rule made for employees protection, when proximate cause of employees injury, will usually bar a recovery. *Biles v. R. R.*, 139—528.

Nonsuit proper where evidence fails to show that failure to receive medicine caused intestate's death. *Byrd v. Express Co.*, 139—273.

Trespasser upon train wrongfully ejected, entitled to recover though knocked under train by striking a post. *Hayes v. R. R.*, 141—196.

Failure of master to provide shield or covering for saw running naked, which protection is a reasonable one and in general use, is negligence. *Jones v. Tobacco Co.*, 141—202.

Negligent act or omission of duty by defendant must first be determined before it is necessary to ascertain proximate cause. *Ibid*, 141—203.

In action for delayed message, plaintiff must show negligence in delivery and this caused mental suffering, and where he could not have reached home earlier had there been no delay, he cannot re-

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cover. *Kernodle v. Tel. Co.*, 141—437.

To answer issue as to defendant's negligence "Yes," there must have been a negligent act which was proximate cause of injury. *Harton v. Tel. Co.*, 141—455.

"Proximate cause" is the last negligent act contributing thereto and without which the injury would not have resulted. *Bowers v. R. R.*, 144—686.

Railroad not liable for burning plaintiff's hotel by fire originating off its right-of-way, catching lumber piled on right-of-way and thence to hotel. *Ibid*, 144—686.

Where pole is allowed to remain on highway in dangerous condition, it falls and is replaced by traveller, and it later fell and injured intestate, defendant negligent. *Harton v. Tel. Co.*, 141—455.

There may be more than one proximate cause and when one is himself blameless, and defendant is responsible for one such cause of injury to plaintiff, action lies. *Ibid*, 141—456.

Proximity in point of time or space, no part of definition. *Ibid*, 141—456.

Test as to whether intervening act has become efficient cause of injury, is whether it and resulting injury is one the author of primary negligence could have reasonably foreseen and expected. *Ibid*, 141—456.

Except in clear cases, question whether intervening act and resultant injury were such as should have been expected, is for jury. *Ibid*, 141—456.

When two efficient proximate causes contribute to an injury, if defendant's negligent act brought about one of them, he is liable. *Ibid*, 141—461.

Where pole was plowed too near to and it fell after heavy rain, it was propped up by a third person and it again fell and injured plaintiff, the original negligent act was not the proximate cause. *Ibid*, 146—439.

Where one is negligent, and an-

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other, moving independently, comes in and either negligently or maliciously so acts as to make my negligence injure a third person, the "free agent" is liable. *Ibid*, 146—439.

To constitute actionable negligence, defendant must have committed a negligent act which was the proximate cause of the injury. *Brewster v. Elizabeth City*, 142—10.

Injury from use of defective coupler under express order of superintendent is causa causans, and a continuing negligence. *Liles v. Lumber Co.*, 142—39.

Where facts are not capable of more than one inference, proximate cause is one of law; but where injury to child under twelve, employed in violation of statute, it is negligence per se on defendant's part, and there is no evidence from which it could be inferred that he was negligent, and proximate cause should not be submitted to jury. *Leathers v. Tobacco Co.*, 144—330.

However negligent he (a passenger) may have been in placing himself in an improper position upon the carrier's vehicle, if his negligence did not contribute in any degree to the accident which befell him, but the accident was the result of negligence of carrier, he may recover. *Miller v. R. R.*, 144—553.

It is sometimes said to be the rule that a plaintiff may recover, though his own negligence exposed him to risk of injury, if defendant, after becoming aware of plaintiff's danger, failed to use ordinary care to avoid injuring him. *Smith v. R. R.*, 145—102.

In action upon death message, if defendant was negligent, and plaintiff could have taken a train and arrived in time for funeral of his father, and made no effort to do so, this was proximate cause of injury. *Edwards v. Tel. Co.*, 147—130.

Where defendant had stored a quantity of dynamite in a shanty and plaintiff fired a pistol ball into a knot hole, causing an explosion

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which injured him, he is not entitled to recover. *McGhee v. R. R.*, 147—145.

Instances when negligent act is and is not proximate cause, recited. *Dortch v. R. R.*, 148—579.

If the negligence of the employer and a fellow employee concurs in producing an injury, the injured employee can recover of either if he himself is free from blame. *Wade v. Contracting Co.*, 149—180.

To recover value of vessel destroyed on account of leakage, plaintiffs must allege and prove that they used due diligence, but did not and could not discover that work was defective so that vessel would leak until too late to avoid that consequence. *Bell v. Machine Co.*, 150—113.

Where injury to servant is occasioned by his disobedience to orders of master, such disobedience is proximate cause of injury and bars recovery. *Crawford v. R. R.*, 150—623.

When there is no causal connection between violation of rule by employee, and his injury by defective machinery, which he had reported, proximate cause is for jury. *Boney v. R. R.*, 145—249.

Doctrine of proximate cause should be included in prayer for instructions as to contributory negligence. *Ibid*, 145—248.

Servant must show that injury was due to defect in machine at which he was working for defendant, and that defendant had notice or could by reasonable care have had notice of defect in machine. *Blevins v. Cotton Mills*, 150—499.

In action upon delayed delivery of death message, it is not sufficient that defendant was negligent, but its negligence must have been the proximate cause of the injury. *Hauser v. Tel. Co.*, 150—558.

Release.—If one be illiterate, unable to read, and a paper-writing be read to him falsely, and he sign it, it shall not be his act or deed. *Hayes v. R. R.*, 143—125.

In action for personal injuries,

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defendant sets up release, not necessary to return money before setting up plea that release was procured by fraud in factum; but if he recovers, amount paid will be deducted. *Ibid*, 143—125.

Where plaintiff executed full release, but denied that it contained the terms of settlement, and there was evidence of negligence and fraud, question was for jury. *Ibid*, 143—125.

Upon question whether one had sufficient mental capacity at time he signed release, evidence of a witness that in her opinion he did not, is not so obscure as to constitute reversible error. *Beard v. R. R.*, 143—136.

Res ipsa loquitur.—Doctrine of *res ipsa loquitur* does not dispense with rule that he who alleges negligence must prove it. It is a mode of proving negligence and does not change burden of proof. *Lyles v. Carbonating Co.*, 140—25.

Where an elevator dropped back several inches, a truck thereon slipped and plaintiff was injured, *res ipsa loquitur* applies. *Fearington v. Tobacco Co.*, 141—80.

Res ipsa loquitur is simply a matter of evidence and to be availed of, appropriate prayer must be handed up in apt time. *Isley v. Bridge Co.*, 141—220.

Res ipsa loquitur not confined to cases of some mechanical appliance which fails in some unusual and unexpected manner to do its work properly. *Fitzgerald v. R. R.*, 141—530.

When a thing in charge of defendant causes injury, and accident is such as ordinarily does not happen by use of proper care, it is evidence of want of care. *Ibid*, 141—530.

Res ipsa loquitur does not apply where gangway built by competent builder, upon proper plan, of good material, safe for purposes for which intended, as tested by actual use, up to few minutes before plank fell. *Shaw v. Mfg. Co.*, 143—131.

Where foreman of force unload-

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ing cars, engaged in performance of duty, was injured because some cars stopped on incline a few feet away, commenced to move without warning to plaintiff, and struck car on which he was standing, proper case for jury. *Bird v. Leather Co.*, 143—283.

If one whose duty it is to hold iron rod while another person, is in a position with reference to it that dropping it will injure him, it is duty of him who is holding it to use ordinary care to prevent its dropping. *Horton v. R. R.*, 145—137.

Rule of prudent man.—One cannot be said to have contributed to his own injury, unless he has failed to exercise that degree of care which a man of ordinary prudence would use for his own safety in the same or substantially similar circumstances, and, further, unless his want of care has proximately contributed to causing the injury of which he complains. *Miller v. R. R.*, 144—548.

In action for injuries sustained by driver of team over road upon which stumps had been left standing, question of negligence should be referred to jury to be determined under rule of prudent man. *Bradley v. R. R.*, 144—558.

In absence of evidence of waiver of rule requiring car repairer to put out blue flag, disobedience of the rule would bar a recovery, but where rule was abrogated and intestate had co-employee to "watch," whether he acted as a man of ordinary prudence is for jury. *Bordeaux v. R. R.*, 150—533.

Tortfeasors.—Tortfeasors contributing to same injury are jointly and severally liable, and one who puts in motion one cause of injury is liable to same extent as if he had been the sole cause. The law does not apportion liability. *Clark v. Guano Co.*, 144—65.

Two defendants committing a tort to injury of plaintiff are jointly and severally liable, and single action against them is not separable and

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cannot be removed by foreign defendant to federal court, though different answers made and different defenses relied on. *Staton v. R. R.*, 144—135.

In action for tort, plaintiff may make it joint or several, at his election, and wrong-doer cannot complain. *Hough v. R. R.*, 144—696.

One may sue tort-feasors jointly or severally at his election, and if he elects to sue them jointly, he has the right to have case tried as for a joint tort, and no separable controversy is presented. *White v. R. R.*, 146—342.

Trespasser.—Measure of duty which owner of premises owes to a trespasser is not to willfully injure him, or to place a dangerous instrumentality on his premises, if he has reasonable cause to believe that a trespasser will come thereon and be injured. *McGhee v. R. R.*, 147—147.

No action lies for injuries sustained by a trespasser passing through a private alleyway and fell into a pit of hot water and was scalded, and doctrine of alluring and attractive buildings and machinery to children does not apply. Rule stated when action would lie. *Briscoe v. Lighting Co.*, 148—414.

Violation of rule.—Violation of known rule made for employees protection, when proximate cause of employees injury, will usually bar a recovery. *Biles v. R. R.*, 139—528.

In action for personal injuries in running into switch to meet defense of contributory negligence in alleged violation of rule requiring engine to be under control in approaching switch without a light, evidence of other employees that rule was constantly violated, length of decedent's run, schedule prescribed, number of switch lights, usual conditions, etc., competent. *Haynes v. R. R.*, 143—154.

Where orders are given engineer by general officers of company, requiring him to run in a different manner from that prescribed in

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rules, and other trains of same class are run to their knowledge in violation of rules, negligence cannot be imputed to engineer though he does not follow general rules. *Ibid*, 143—154.

Principle that violation of rule made by employer for employees protection, when proximate cause of injury, bars recovery, does not obtain when it is habitually violated to knowledge of employer, or so frequently and for such a length of time that it could, by exercise of ordinary care, have ascertained its non-observance. *Ibid*, 143—154.

Where freight train took siding for another train to pass, and it was flagman's duty after taking siding to lock switch to main line, stand near switch and give necessary signals to approaching train, he did not perform this duty and it was immediate cause of collision in which he lost his life, nonsuit proper. *Holland v. R. R.*, 143—435.

When there is no causal connection between violation of rule by employee, and his injury by defective machinery, which he had reported, proximate cause is for jury. *Boney v. R. R.*, 145—249.

In absence of evidence of waiver of rule requiring car repairer to put out blue flag, disobedience of the rule would bar a recovery, but where rule was abrogated and intestate had co-employee to "watch," whether he acted as a man of ordinary prudence is for jury. *Bordeaux v. R. R.*, 150—533.

When bulletined rule requiring car repairers to put up blue flag was violated, to knowledge of engineer when short jobs were to be done, and he "kicked" a car at an excessive rate of speed on the track and against the car upon which plaintiff's intestate was working, it is culpable negligence. *Ibid*, 150—532.

Though rule may have become in abeyance, defendant is not thereby deprived of its rights to give specific orders to its brakemen and insist on obedience to them. *Crawford v. R. R.*, 150—622.

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Where brakeman was injured by stepping on moving engine, defendant is entitled to instruction as to its rules forbidding such an act. *Ibid*, 150—621.

Where injury to servant is occasioned by his disobedience to orders of master, such disobedience is proximate cause of injury and bars recovery. *Ibid*, 150—623.

Willful acts.—To recover for a willful wrong, there must be evidence tending to give it the character imputed to it as well as alleging it in complaint. *Bailey v. R. R.*, 149—175.

To constitute a willful injury, the act which produced it must have been intentional, and must have been done under such circumstances as evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of. *Ibid*, 149—174.

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Generally.—Instrument payable to bearer, negotiated by delivery. *Tyson v. Joyner*, 139—69.

Defendant's counterclaim good against his note. *Ibid*, 139—74.

Where plaintiff owns equitable title to note, defendant entitled to instruction showing matters of defense between him and endorsee. *Ibid*, 139—69.

Acceptance of draft from debtor does not merge debt or operate as payment unless expressly agreed. *Chemical Co. v. McNair*, 139—326.

Taking negotiable security for open account suspends right of action till maturity of note, and it must be surrendered for plaintiff to sue on original cause of action. *Buggy Co. v. Dukes*, 140—393.

Acceptance of promissory note for open account, unless expressly so agreed, will not discharge original cause of action. *Ibid*, 140—393.

Where one who obtains cashier's check from bank in this State, negotiates it to one living in Virginia five days later, negotiation was within reasonable time. *Mfg. Co. v. Summers*, 143—103.

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Authority to draw, accept or endorse bills, notes and checks not readily implied as incident to express authority of agent, but it may be implied if execution of paper is a necessary incident to business. *Bank v. Hay*, 143—326.

One dealing with negotiable instrument has right to act upon it as it appears upon its face. *Bank v. Burch*, 145—318.

Execution of note under seal in name of partnership, by a member of firm, is the contract of the firm. *Cowan v. Cunningham*, 146—453.

Acceptance.—Letter written within reasonable time before or after date of bill of exchange, describing it, and promising to accept it, is, if shown to the person who afterwards takes the bill on credit of the letter, a virtual acceptance and binds him who makes the promise. *Bank v. Hay*, 143—326.

Assignment.—Notice to debtor not necessary to validity of assignment of non-negotiable instrument as between assignor and assignee. *Chemical Co. v. McNair*, 139—326.

Notice to debtor of assignment of non-negotiable instrument, necessary to protect assignee from payment to original creditor. *Ibid*, 139—326.

Bill of lading with draft.—Holder of draft or bill of exchange, who takes an attached bill of lading by assignment or otherwise as security for amount advanced on draft, becomes owner of goods as against acceptor to an extent sufficient to secure and protect his claim, but it does not impose upon him the burden of making good a contract as to the goods between consignor and consignee. *Mason v. Cotton Co.*, 148—499.

Holder of negotiable instrument with bill of lading attached, under circumstances indicated, was by right superior to that of a consignee who had accepted and paid draft drawn on him for purchase price of goods. *Ibid*, 148—499.

Blanks.—Holder of note in blank

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may fill blank over signature. *Tyson v. Joyner*, 139—69.

Bona fide holder.—Title of bona fide holder of note good against prior equities of which he had no notice. *Tyson v. Joyner*, 139—69.

Presumption of law that owner of negotiable note is bona fide holder. *Ibid*, 139—73.

In action on draft by plaintiff claiming to be holder in due course, error to exclude evidence of defendant tending to show that draft had been seen at bank unendorsed after maturity. *Mayers v. McRimmon*, 140—640.

Who is holder in due course. *Mfg. Co. v. Summers*, 143—103.

Where evidence and verdict shows title of one who negotiated check was defective, burden is upon him to show that he was a purchaser in good faith, for value and without notice. *Ibid*, 143—103.

When negotiable instrument sued on has been procured by fraud, one claiming to be holder in due course must show that he acquired title before maturity, in good faith for value, without notice of any defect in title of person negotiating it, and this question is for jury. *Bank v. Fountain*, 148—593.

When an agent for collection of a draft has acted within the apparent scope of his authority and exceeds his power, so that a holder in due course acquires paper for value and without notice of a restrictive agreement between original parties, drawer may be held responsible to such holder. *Bank v. Oil Mills*, 150—722.

Bank which acquires draft by purchase and without notice from another bank for an existing indebtedness, is liable for value. *Ibid*, 150—723.

Collaterals.—Collateral deposited in bank may be collected by bank at maturity, though debt for which it is collateral is not due. *Fitts v. Grocery Co.*, 144—468.

Delivery upon condition.—Holder of negotiable instrument who has violated his agreement with maker

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by negotiating it without performing a condition precedent to its validity, is liable to maker in such sum as he may have been lawfully compelled to pay thereon to innocent purchaser for value, without notice. *Hughes v. Crooker*, 148—319.

When note is given in pursuance of terms of written contract, evidence of contemporaneous oral agreement, made as part thereof, that note and contract were executed and given upon a condition precedent to their validity, which has not been performed, is competent. *Ibid*, 148—320.

Dishonor.—Surety on note not discharged from liability because he was not given notice of dishonor. *Rouse v. Wooten*, 140—557.

When one signs his name in blank on back of note, and he is not otherwise a party to the instrument, he is liable as an endorser and entitled to notice of dishonor after its maturity. *Perry v. Taylor*, 148—363.

Endorsement.—Introduction of note, with name of endorsee on back, not sufficient to vest title. *Tyson v. Joyner*, 139—69.

What is special endorsement? *Ibid*, 139—74.

Purchaser of note without endorsement, only gets right which payee has. *Ibid*, 139—69.

Purchaser of note without endorsement may sue for debt in own name, or that of payee. *Ibid*, 139—69.

Signatures of endorsers, where endorsement required to vest legal title, must be proved. *Ibid*, 139—69.

No endorsement necessary to note payable "to bearer." *Ibid*, 139—69.

Note payable "to order" must be specially endorsed by payee to holder to transfer title. *Ibid*, 139—69.

When defendant's intestate endorsed plaintiff's note to A, when no personal liability of intestate. *Hicks v. Kenan*, 139—337.

Stamping of drawee's name on back of draft, by one having authority to do so and with intent to endorse it, is a valid endorsement. *Mayers v. McRimmon*, 140—640.

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Endorsement essential to constitute holder in due course of negotiable instrument payable to order. *Ibid*, 140—640.

Endorsement does not prove itself; must be established by proper testimony. *Ibid*, 140—642.

Endorsement of "all right, title and interest" of payee does not affect its negotiability. *Evans v. Freeman*, 142—61.

Where note secured by mortgage, is assigned, in equity, endorsement of note passed title to it, with right to mortgage security as an incident. *Smith v. Godwin*, 145—242.

In contract made by corporation guaranteeing certain conditions to purchaser of its stock, it was stated that corporation had signed as principal and its stockholders as sureties, some of officers signing with their official designation, intent of parties to bind them personally was not changed by form of signatures. *Basnight v. Jobbing Co.*, 148—357.

If terms of the contract clearly and sufficiently determine the intent and meaning of the parties, form of the signature is not important and will not bring the case within any exception to the rule. *Ibid*, 148—357.

When one signs his name in blank on back of note, and he is not otherwise a party to the instrument, he is liable as an endorser and entitled to notice of dishonor after its maturity. *Perry v. Taylor*, 148—363.

Where draft or bill is transferred to bank by restrictive endorsement, as "for deposit," the instrument is taken and held by bank as agent for endorser, and for purpose indicated, and subject to right of endorser to arrest payment or divert proceeds in hands of any intermediate or sub-agent who has taken the paper for like purpose and affected by the restriction. *Bank v. Oil Mills*, 150—721.

Drawer of draft, ordinarily standing towards subsequent parties as a general endorser, may, by appropriate words appearing on paper, or by agreement dehors the instrument as to persons affected with

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notice, retain the right to arrest payment. *Ibid*, 150—721.

When an agent for collection of a draft has acted within the apparent scope of his authority and exceeds his power, so that a holder in due course acquires paper for value and without notice of a restrictive agreement between original parties, drawer may be held responsible to such holder. *Ibid*, 150—722.

Execution and delivery.—In action upon a bond, evidence that maker said it was hers, that she directed her son to write it for her, she had been seen to make payments and direct credits to be entered thereon, sufficient upon question of its being "signed, sealed and delivered" by obligor. *Moose v. Crowell*, 147—552.

Kiting checks.—"Kiting" of checks from one bank to another will not be implied as being within scope of authority of general state agent of life insurance company; if bank knew, or should have known, such to be the case, then there was no liability upon part of defendant. *Bank v. Ins. Co.*, 150—774.

In action by bank to recover upon one of a series of "kiting" checks alleged to have been made by cashier under authority of her company, and to have been acquired by plaintiff for value, burden of proof is on plaintiff to show cashier had authority alleged. *Ibid*, 150—775.

Negotiable instruments; payment arrested.—Where draft or bill is transferred to bank by restrictive endorsement, as "for deposit," the instrument is taken and held by bank as agent for endorser, and for purpose indicated, and subject to right of endorser to arrest payment, or divert proceeds in hands of any intermediate or sub-agent who has taken the paper for like purpose and affected by the restriction. *Bank v. Oil Mills*, 150—721.

Drawer of draft, ordinarily standing towards subsequent parties as a general endorser, may, by appropriate words appearing on paper, or by agreement dehors the in-

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strument as to persons affected with notice, retain the right to arrest payment. *Ibid*, 150—721.

Payment upon condition.—Parties may annex a lawful condition to payment of negotiable instrument at time it is given, when action to recover is between original parties. *Aden v. Doub*, 146—12.

Negro.

See *School*, district. *Evidence*, ancestry. *Marriage*, slave.

Newly Discovered Evidence.

See *New Trial*, newly discovered evidence. *Evidence*, newly discovered. *Appeal*.

New Promise.

See *Contracts*, consideration. *Statute of Frauds*, promise to answer for debt of another. *Statute of Frauds*.

NEW TRIAL.

Generally.—Where two issues are independent and clearly severable, discretionary with supreme court to restrict new trial to said issues. *Yarborough v. Hughes*, 139—200.

When defendant recovers judgment of plaintiff, who appealed, new trial granted, and defendant again recovers, plaintiff is taxable with costs of first trial. *Williams v. Hughes*, 139—16.

When error in trial affects only one issue and new trial is ordered, it will be granted only as to that issue. *Isler v. Lbr. Co.*, 146—558.

Granting of new trial because verdict is against weight of evidence, is not reviewable. *Clothing Co. v. Bagley*, 147—38.

Duty of judge to submit such issues as are necessary to settle material controversies in pleadings, and in absence of such as sufficient to justify those rendered, new trial lies. *Williamson v. Bryan*, 142—81.

New trial granted where there

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are conflicting instructions upon a material point. *Wilson v. R. R.*, 142—341.

Venire de novo will be ordered when from peculiar emphasis, or language, or manner in presenting or arraying evidence, judge indicates his opinion upon facts or conclusions of law. *Withers v. Lane*, 144—184.

Improper and reprehensible language uncorrected by trial judge, is ground for new trial. *Moseley v. Johnson*, 144—257.

In awarding new trial upon one issue alone, it should clearly appear that matter involved is entirely distinct and separate from matters involved in other issues, can be had without danger of complication and that no possible injustice can be done either party. *Jarrett v. Trunk Co.*, 144—299.

Where new trial is granted, awarding of costs is discretionary. *Metal Co. v. R. R.*, 145—299.

Supreme court will grant new trial of its own motion when facts may be more fully developed and questions intended to be presented, more clearly presented, when to do otherwise injustice might be done to one or both parties. *Hawk v. Lumber Co.*, 149—16.

When new trial has been granted in appeal of one party, appeal in same action by other party will be dismissed. *Ibid*, 149—17.

New trial may be granted by court in its discretion upon one of several issues when they are entirely distinct and separate from matters involved in other issues. *Rushing v. R. R.*, 149—163.

Denied.—Sharp retorts of counsel in argument of case, causing applause of several minutes, not ground for new trial when strongly reprimanded by judge, and when there was no intention to prejudice jury. *S. v. Harrison*, 145—409.

New trial not allowed where incompetent evidence withdrawn from jury and language of judge so clear in withdrawing it, this court is satisfied jury could not

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have been misled. *Parrott v. R. R.*, 140—546.

New trial will not be granted for exclusion of certain evidence, when supreme court is convinced that substantial justice has been done and evidence proposed would not have changed the result. *Smith v. Lumber Co.*, 142—27.

New trial denied when action of trial judge, if erroneous, could, by no possibility, injure appellant. *S. v. Hodge*, 142—685.

Where court upon motion of prisoner's counsel made order that witnesses be sent out of court room and separated, refusal to allow one of defendant's witnesses, who was kept in court room contrary to order of court and without its knowledge, not ground for new trial. *Ibid*, 142—676.

When prayers are presented in apt time, refusal of judge to consider them is error, even if adjournment is necessary to give time therefor; but new trial will not be granted when it appears from charge that there was no error of which either party could complain. *Moseley v. Johnson*, 144—258.

When all essential facts, upon which rights of parties depend, appear upon pleadings or have been found by jury, supreme court will not upon mere question of form set aside judgment and subject parties to new trial. *Rich v. Morisey*, 149—41.

When charge given presents every phase of controversy, with correct instructions as to the law, new trial will not be awarded for failure to give instructions asked, although they may involve correct propositions of law. *Muse v. R. R.*, 149—452.

Judge must put his entire charge in writing, when so requested, and it is not reversible error to state the contentions of parties orally, or to supplement it in slight omissions. *S. v. Khoury*, 149—457.

Unless some question of law or legal inference is involved, granting or refusing new trial upon

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any or all of the issues rests in sound discretion of court, and action of court is not reviewable. *Billings v. Observer*, 150—543.

Newly discovered evidence.—New trial will not lie for newly discovered evidence merely cumulative. *Myatt v. Myatt*, 149—141.

See also: *Aden v. Doub*, 146—12.

Affidavit for new trial for newly discovered evidence must show that evidence is more than cumulative and that applicant has used due diligence in procuring it. *Gay v. Mitchell*, 146—511.

See also: *Aden v. Doub*, 146—12.

Practice in motion in supreme court for new trial for newly discovered evidence. *Crenshaw v. Street Railway Co.*, 140—192.

Refusal of judge to set aside referee's report for newly discovered evidence, is not reviewable. *Henderson v. McLain*, 146—333.

All questions incident to appeal from order continuing restraining order to the hearing are carried by appeal to supreme court, and trial judge has no power thereafter to hear motion to set aside judgment for newly discovered evidence. *Combes v. Adams*, 150—70.

NEXT FRIEND.

Next friend for infant suing in justice's court, may be appointed either by justice or clerk. *Houser v. Bonsal*, 149—55.

See *Guardian ad litem* and next friend.

Next of Kin.

See *Heirs*, executors and administrators.

NOMINAL DAMAGES.

Every unauthorized and unlawful entry into the close of another is a trespass from which the law infers some damage. *Braeme v. Clark*, 148—365.

See *Damages*, nominal.

NON COMPOS.

Control of property of.—Where court has custody of property of

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lunatic, it will not be applied to his general debts, till a sufficient fund is set aside for support of himself and family; but just debts will not be stayed where lunatic has been provided for. *Lemly v. Ellis*, 146—224.

See also: Fraud and Mistake; Contracts, of non compos; Guardian and Ward.

NONRESIDENT.

Court has jurisdiction to adjudge against nonresident defendant only to extent of property seized. *May v. Getty*, 140—311.

Statute of limitations does not run in favor of nonresident individual or corporation. *Green v. Ins. Co.*, 139—309.

See also: Summons, service on nonresident; Corporation, domestication, and process agent; Attachment.

NONSUIT.

Generally.—When court at close of testimony withdrew portion of plaintiff's evidence from jury, he may submit to involuntary nonsuit and appeal. *Hayes v. R. R.*, 140—131.

One plaintiff may submit to nonsuit where complaint states no cause of action in his favor. *Pritchard v. Mitchell*, 139—54.

Protesting one's entry upon vacant lands is not a civil action and protestant cannot submit to a nonsuit. *In re Williams*, 146—270.

Where plaintiff is nonsuited, supreme court will not dismiss action because complaint defective, or action barred. *Bonner v. Stotesbury*, 139—4.

In cases of equitable nature, if account has been taken and report made, plaintiff may not suffer judgment of nonsuit. *Boyle v. Stallings*, 140—524.

Voluntary nonsuit taken by plaintiff, after defendant's motion denied, because of disagreement between court and plaintiff's counsel as to measure of damages, no appeal lies. *Merrick v. Bedford*, 141—504.

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Intimation by judge upon some proposition of law adverse to plaintiff, which does not take case from jury, will not justify nonsuit by him. *Ibid*, 141—506.

Upon adverse intimation of judge, plaintiff may except and appeal. *Morton v. Lumber Co.*, 144—31.

Appeal from denial of motion to nonsuit entitles defendant in supreme court to urge any view of plaintiff's evidence which involves right to maintain action. *Stone v. R. R.*, 144—220.

On appeal from judgment of nonsuit, supreme court will examine entire record to see if cause of action is alleged or proven sufficient to entitle plaintiff to any relief. *Faust v. Faust*, 144—383.

An answer which contains nothing to aid allegations of complaint, does not preclude motion to dismiss. *Painter v. R. R.*, 144—436.

Plaintiff may submit to nonsuit before verdict unless defendant has set up counterclaim or right to affirmative relief. *R. R. v. R. R.*, 148—69.

When plaintiff has alleged and proved facts which, at least, entitle him to recover nominal damages arising from breach of contract, nonsuit will not lie upon theory that no substantial damages have been shown. Quantum of damages beyond those which are nominal, must be determined by jury, under proper instructions, and is not involved in motion to nonsuit. *Edwards v. Erwin*, 148—433.

Where affidavit for attachment alleges breach of contract, and proof shows a tort, if there is a variance it cannot be taken advantage of by motion to nonsuit. *Ibid*, 148—433.

It is more orderly for plaintiff, whose prayer for special instructions has been refused, to note an exception instead of taking a nonsuit. *Wilson v. Fisher*, 148—538.

Motion for nonsuit waived by putting on evidence and not renewing motion at close of all evidence. *Teal v. Templeton*, 149—34.

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Judgment of nonsuit relates to cause of action, and not amount of damages. *Hoss v. Palmer*, 150—18.

Motion to nonsuit must be made at close of plaintiff's evidence and then after all evidence is in, or any rights will be waived. *Bordeaux v. R. R.*, 150—530.

New action brought.—New action may be brought within a year when supreme court sustains a nonsuit. *Tussey v. Owen*, 147—338.

Where nonsuit was had, and upon appeal, case dismissed in supreme court under Rule 17, new action may be instituted within a year for same cause of action and upon same state of facts. *Lumber Co. v. Harrison*, 148—333.

Overruled.—Where there was evidence from which the jury could have drawn conclusion that defendant had failed in discharge of his duty, nonsuit properly overruled. *Knowles v. Savage*, 140—372.

Refusal to nonsuit proper where employee, acting under order of superintendent, was injured in coupling defective cars of which he had no notice till too late to escape. *Liles v. Lumber Co.*, 142—39.

Motion to nonsuit properly denied, where evidence showed that cinders emitted from defendant's engine caused the fire and spark arrester was in bad condition. *Whitehurst v. R. R.*, 146—592.

In questions of nonsuit, if there is any evidence, or if different minds can draw different conclusions, case should be submitted to jury. *Kyles v. R. R.*, 147—396.

When there is more than a scintilla of evidence, question is for jury. *Currie v. Gilchrist*, 147—656.

When there is evidence that defendant acknowledged debt, refusal to nonsuit proper. *Laney v. Hutton*, 149—266.

Nonsuit, proper.—Where plaintiff ceased paying assessments because

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defendant ceased writing such insurance and increased the annual instalments, nonsuit proper. *Green v. Ins. Co.*, 139—309.

When plaintiff fails to show that his assessments increased because defendant ceased writing assessment insurance or that he was discriminated against, nonsuit proper. *Ibid*, 139—309.

Defendant in ejectment has grant from State, plaintiff failed to show title out of State or color of title, error in refusing to nonsuit. *Lindsay v. Austin*, 139—463.

Nonsuit proper where evidence fails to show that failure to receive medicine caused intestate's death. *Byrd v. Express Co.*, 139—273.

In proceeding relating to entry on vacant lands, plaintiff showed possession only between 1874-6, and no deed from anyone for any part of land covered by entry except three deeds which failed to connect plaintiff with land, properly dismissed. *Johnson v. Westcott*, 139—27.

Judge should nonsuit when evidence not legally sufficient to justify verdict for plaintiff. *Kearns v. R. R.*, 139—470.

Where plaintiff after institution of action, conveys by deed in fee, error to refuse defendant's motion for nonsuit. *Burnett v. Lyman*, 141—500.

Where conductor signalled engineer ahead to put flat car on side track, and at same time intestate stepped across to flat car, it pulled loose and he fell and was killed, nonsuit proper. *Jones v. R. R.*, 142—207.

Passenger standing on platform and running board of street car, struck by rear end of ice wagon, nonsuit proper. *Hollingsworth v. Skelding*, 142—246.

Where motion to nonsuit denied below, and sustained in supreme court, duty of superior court to dismiss upon coming down of judgment. *Ibid*, 142—246.

Railroad carrying on its cars vendors of fruits for sale to pas-

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sengers does not invite or induce the public to enter them, and entry of one for this purpose is a permissive license and he took the risk incident to movement of train, and in absence of wanton injury, nonsuit proper. *Peterson v. R. R.*, 143—260.

In action demanding judgment for title and possession of land, when pleadings and evidence show that direct action to charge land with indebtedness should have been brought, and no motion to amend pleadings was made, nonsuit proper. *Henderson v. Eller*, 147—582.

In action for personal injuries received by being hit by run-a-way horse, where motorcycle and engine were stopped 150 yards before meeting horse, and when opposite the cycle the horse shied and ran, nonsuit was proper. *Long v. Warlick*, 148—33.

Notary Public.

See Deeds, probate.

Notes.

See Negotiable Instruments; Judge's Charge, written.

NOTICE.

Notice to debtor of assignment of nonnegotiable instrument, necessary to protect assignee from payment to original creditor. *Chemical Co. v. McNair*, 139—326.

Notice to debtor not necessary to validity of assignment of non-negotiable instrument as between assignor and assignee. *Ibid*, 139—326.

Notice to be given company in suit for mental anguish. *Dayvis v. Tel. Co.*, 139—78.

Principal bound by any notice acquired by his agent during course of agency. *Wright v. Cotten*, 140—7.

When city issues permit to plumber to lay water pipes in street and dig ditches therefor, it is expressly charged with knowl-

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edge of character of work and its dangers to those who use the street. *Kinsey v. Kinston*, 145—109.

Service of notice in superior court by constable insufficient. *Brown v. Myers*, 150—444.

NOTICE TO PRODUCE.

Notice to produce not necessary, when. *Yarborough v. Hughes*, 139—200.

When the contents of a letter came in question, and the writer kept no copy of it, he might testify as to its contents, after serving notice upon opposite party to produce original, which had not been done. *Rheinstein v. McDougall*, 149—254.

Novation.

See Contracts; Statute of Frauds, promise to answer for debt of another.

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Generally.—When water falls from the roof of one's building and injures adjacent property, action lies. *Davis v. Smith*, 141—110.

Facts as to negligent construction of spur track and use of coal chute constitute actionable nuisance. *Thomasson v. R. R.*, 142—300.

Measure of damages in action for nuisance, is depreciation in value of home as dwelling three years before bringing action, inconvenience and unpleasantness. *Ibid*, 142—300.

Use of sidetrack by railroad as hostelry, not unreasonable. *Ibid*, 142—318.

One living near railroad constructed lawfully cannot complain of noise and vibration of trains passing in ordinary course of traffic. *Ibid*, 142—318.

Injunction denied in advance of creation of alleged nuisance, when act complained of may or may not become nuisance, or when injury apprehended is doubtful. *Hickory v. R. R.*, 143—451.

Decree of superior court enjoining defendant from enlarging

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freight depot, upon jury's finding that enlargement would constitute public nuisance, will be modified to permit defendant to remedy and guard against any possible danger in crossing tracks by erecting gates and providing a gateman. *Ibid*, 143—451.

Magistrate has concurrent jurisdiction in civil action for \$50 damages for nuisance. *Duckworth v. Mull*, 143—461.

Equity will not restrain a private nuisance that is merely dubious, possible or contingent. One is not entitled to injunction for public nuisance unless he show special damage. *Durham v. Cotton Mills*, 144—709.

Temporary damage sustained by property, and injunction, is the remedy for unlawful and unwarranted acts of railroad in management of its terminal, amounting to a nuisance. *Taylor v. Ry.*, 145—407.

The establishment and proper use of a freight station across the street from plaintiff's property does not constitute actionable nuisance. *Ibid*, 145—404.

Action for damage for unlawful use by railroad of a street amounting to a nuisance is limited to within three years prior to commencement of action. *Staton v. R. R.*, 147—448.

It is not a nuisance for dynamite, contained in boxes plainly marked, to be stored in open shanty car when placed for legitimate purpose of railroad construction work. *Fanning v. White*, 148—544.

Where nuisance complained of does not involve any physical interference with personal or proprietary rights of another, recovery cannot be had, even for nominal damages, by simply showing that a nuisance has been created or maintained; but plaintiff must go further and show that it has injuriously affected him in some substantial right or there is imminent danger that it will do so. *McManus v. R. R.*, 150—661.

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To maintain private action for damages caused by public nuisance, owner is not required to establish the existence of damage special and peculiar in reference to injury generally suffered by other adjacent owners who are similarly situated, and where issue as to special damage was answered "nothing" verdict is not sufficiently full and responsive to entitle either party to judgment. *Ibid*, 150—662.

Public.—Fishing, when prohibited by law, is a public nuisance. *Daniels v. Homer*, 139—219.

Inconvenience to the public, causing some delay incident to operation of railroad and enlargement of freight depot in center of city, not a nuisance. *Hickory v. R. R.*, 141—716.

City is proper party to institute action to prevent public nuisance by proposed enlargement of freight depot. *Ibid*, 141—716.

Citizen injured by erection of nuisance on private premises in violation of an ordinance, has right to criminal prosecution, injunction or abatement. *Hull v. Roxboro*, 142—453.

Private citizen may not sue for obstruction or interference with navigation, unless he suffer special damage. *Pedrick v. R. R.*, 143—485.

State is proper party to complain of wrong done to its citizens by public nuisance, and court will act with great caution in interfering at suit of private citizens. *Ibid*, 143—485.

One who owns sawmill on banks of navigable river and procures logs for his mill coming down river both above and below a proposed bridge, is an abutting owner and may enjoin maintenance of railroad draw-bridge below his mill as public nuisance. *Ibid*, 143—485.

Draw-bridge over navigable river is not such an obstruction to navigation as to be a nuisance. It must materially interrupt general

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navigation to be a nuisance. *Ibid*, 143—486.

Where bridge over navigable stream is erected for public purposes, produces public benefit, and leaves reasonable space for passage of vessels, it is not indictable. Bridge must plainly appear to be a nuisance before it can be so decreed, since equity court gives defendant benefit of all reasonable doubts. *Ibid*, 143—506.

What is sewage? *Durham v. Cotton Mills*, 144—705.

A public nuisance is actionable only when private injury is sustained by plaintiff. He must state and prove facts sufficient to show what the duty is, and that defendant owes it to him. *McGhee v. R. R.*, 147—145.

User of hospital for tuberculosis and contagious diseases in residential portion of thickly settled community, should be enjoined till hearing. *Cherry v. Williams*, 147—456.

Tugboat is not authorized to run into marine railway unnecessarily and negligently, though railway was illegally placed and constructed and was a public nuisance. *Ives v. Gring*, 150—138.

Municipal corporation has no legal right to establish and maintain a condition which creates a public nuisance, per se. Injunctive power of court will be exercised with great caution, and only in a clear case. Defendant in this case is called upon to answer complaint. *Jones v. North Wilkesboro*, 150—650.

In action for injury from maintenance of pond and to enjoin rebuilding of dam, parties may by consent order of arbitration, voluntarily enlarge scope of controversy to include in award a scheme of drainage. *Snell v. Chatham*, 150—735.

Where city in exercise of its police powers, constructs sewer so as to empty in small branch above home of plaintiff's intestate, and on account of odors arising the inter-

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tate contracted fever and died, no action lies. *Metz v. Asheville*, 150—750.

Obstructions.

See Nuisance, public; Roads and Streets; Highways, use of.

OFFICE.

Title to.—Title to office cannot be determined upon mandamus. *Burke v. Commrs.*, 148—47.

When one is in office under judgment in quo warranto proceedings, and it is contended that he has not given proper bond, he cannot be ousted, except when, upon application to court, judgment of induction is revoked for his failure to tender proper bond. *Ibid*, 148—47.

One may hold office of justice of the peace and recorder at same time. *S. v. Lord*, 145—480.

See Register of Deeds, office of.

Onus.

See Burden of Proof; Evidence, burden of proof.

Opinion.

See Evidence, opinion; Evidence, expert.

OPTION.

Option to purchase timber upon condition when vendee should signify his acceptance within time specified, and vendor should at once prepare deed and deliver it upon compliance with terms of sale, makes it the duty of vendor to tender deed within the time, unless it was waived. *Hardy v. Ward*, 150—391.

When terms used in option to buy timber are doubtful, it is construed most strongly against plaintiff, who seeks to enforce option. *Ibid*, 150—391.

When 30 day option to purchase timber has been given for nominal consideration, providing for cash payment and notes for balance of purchase price, tender of payment upon specified terms is necessary,

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<p>and mere acceptance within the time will not suffice. <i>Ibid</i>, 150—391.</p>	<p>rebuttable. <i>Griffin</i>, ex parte, 142—116.</p>
<p>Orders.</p>	<p>Parol evidence competent to rebut presumption of advancement arising upon face of deed. <i>Ibid</i>, 142—116.</p>
<p>See Judgments; Appeal, non-ap-pealable orders.</p>	<p>Defendant is under natural obligation to support illegitimate offspring and maintain mother in her sickness. <i>Burton v. Belvin</i>, 142—153.</p>
<p>Ordinances.</p>	<p>Custody.—Where small child was placed by father with grandparents, with whom it resided eight years, court found as fact that father did not abandon child and its interests will not be prejudiced by giving child to father, supreme court will not disturb order that child be restored by grandparents to father. <i>Newsome v. Bunch</i>, 144—15.</p>
<p>See Municipal Corporations, ordinances.</p>	<p>Legitimizing Issue.—Cohabitation meant by Revisal 1556, Rule 13 of Descents, means exclusive cohabitation, such as is usually signified by the words "living together as man and wife." <i>Spaugh v. Hartman</i>, 150—455.</p>
<p>Ouster.</p>	<p>PARTICULARS.</p>
<p>See Ejectment; Tenants in Common, ouster; Office, title to.</p>	<p>Bill of.—Defective statement in pleading is waived by not demurring or moving to make allegation more specific. <i>Hough v. R. R.</i>, 144—704.</p>
<p>Owely.</p>	<p>Parol Agreement.</p>
<p>See Partition, owely.</p>	<p>See Evidence, parol; Contracts, parol.</p>
<p>PARDON.</p>	<p>Partial Payment.</p>
<p>One of essential requisites to validity of pardon is that it must be delivered, and delivery is not complete without acceptance, and this may be in person or by attorney. In re <i>Williams</i>, 149—438.</p>	<p>See Payment, partial.</p>
<p>Defendant cannot plead to indictment and set up pardon as bar to future prosecution, as it can only be issued after conviction. Its validity can only be tested in habeas corpus. <i>Ibid</i>, 149—438.</p>	<p>PARTIES.</p>
<p>When pardon has been delivered to attorney, costs have been paid and conditions precedent complied with, it is irrevocable, unless defendant shall violate conditions subsequent by his conduct after his release. <i>Ibid</i>, 149—438.</p>	<p>Generally.—Agent to sell goods on del credere commission is not real party in interest, and cannot maintain in his own right or by construction, as trustee of express trust, an action to recover for goods sold. <i>Chapman v. McLawhorn</i>, 150—167.</p>
<p>PARENT AND CHILD.</p>	<p>Persons who are not parties or privies, and do not appear to be affected, have no rights upon mo-</p>
<p>Generally.—Law implies promise of parent to pay for services rendered him by adult child who had married and removed from parents' home. <i>Winkler v. Killian</i>, 141—575.</p>	
<p>When a child after arrival at full age continues to reside with and serve parent, it is presumed that service is gratuitous. <i>Ibid</i>, 141—580.</p>	
<p>Gift of property or money from parent to child is <i>prima facie</i> an advancement, but presumption is</p>	

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tion to vacate. *Card v Finch*, 142—140.

Where husband made party pro forma in action of ejectment by wife, he cannot recover on proof that equitable title is in him. *Perry v. Hackney*, 142—368.

Where one's title will be affected if decree is set aside, he will not be heard upon this motion if not party to action. *Johnson v. Johnson*, 142—462.

Husband may sue for and recover in his own name injuries to wife that deprive him of her services or society; and if injuries are permanent, he can recover for future diminished capacity for labor on her part. *Kimberly v. Howland*, 143—399.

When goods are delivered to carrier for transportation, and bill of lading issued, the title, in absence of any direction or agreement to contrary, vests in consignee, who is alone entitled to sue as "party aggrieved," for penalty. *Stone v. R. R.*, 144—220.

A judgment is necessary to abate an action, and court may, ex mero motu, enter judgment when plaintiff has failed for a year to prosecute his action against defendant's representatives. *Rogerson v. Leggett*, 145—7.

Upon death of defendant, summons should issue for his representative, and plaintiff may not keep action in semi-dormant condition till it suits his pleasure to call heir into court. *Ibid*, 145—6.

Failure to join necessary party is error; but joinder of unnecessary parties is immaterial, save as to costs. *Ormond v. Ins. Co.*, 145—142.

Where proceeding appears to be in all respects regular, and plaintiffs appear on its face to be parties to it, they are apparently bound by it. If they were made parties without their knowledge or consent, and have not ratified or consented to decree, it may be set aside by motion in cause. *Hargrove v. Wilson*, 148—441.

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Objection for defect of parties must be made by demurrer or answer. *Bridgers v. Staton*, 150—221.

Where it appears upon face of record that certain persons in interest were not made parties, or that they appeared voluntarily, they are not bound by judgment. *Moore v. Lumber Co.*, 150—263.

Revisal 1447 seems to make the question of right to serve process on defendant outside of county of the justice, to depend somewhat upon good faith of plaintiff in joining defendants as parties, and in certain cases it may be so plain that plaintiff has no real or bona fide claim against defendant who is a resident of the county in which suit is pending, that question of misjoinder may be presented as one of law. *Marler Co. v. Clothing Co.*, 150—522.

Additional.—Court may at any time, before or after judgment, direct others to be made parties. *Walker v. Miller*, 139—448.

Denial, without reasons, of motion to make additional party defendant, a proper but not necessary one, not reviewable. *Aiken v. Mfg. Co.*, 141—339.

Appeal from clerk in processioning proceeding carries entire case to superior court, and it was proper to permit others who had acquired interests in the land to answer, so that it might finally be disposed of. *Batts v. Pridgen*, 147—135.

Orders of lower court making additional parties to action are usually discretionary, and appeal therefrom is premature when it does not appear how rights of appellant are prejudiced. *Etchison v. McGuire*, 147—388.

Defect of.—When general denial entered, any existing defect of parties waived. *Cherry v. Canal Co.*, 140—422.

Contract of sale was made with plaintiff "and others." Demurrer sustained where associates not joined. *Winders v. Hill*, 141—694.

PARTIES.

Examination of.—Right to examine officers of foreign corporation as witnesses is based upon statement in complaint of cause of action, or proper affidavits for the purpose. *Tobacco Co. v. Tobacco Co.*, 145—382.

See Production of Papers.

Intent of.—Estate of inheritance would generally pass without use of word "heirs" if such was clear intent of parties. *Smith v. Proctor*, 139—314.

"Heirs now living," "children," "issue," etc., are words of limitation or purchase as will best accord with manifest intention of him who employs them. *Ibid*, 139—314.

Necessary.—Bargainee of land, pendente lite, necessary party. *Burnett v. Lyman*, 141—500.

Proper.—Sheriff is proper party defendant in action to restrain collection of back taxes, but commissioners may make themselves parties if they desire. *Lumber Co. v. Smith*, 146—199.

Where general right claimed, arising out of series of transactions tending to one end, several causes of action against defendants having distinct interest, proper. *Oyster v. Mining Co.*, 140—135.

City is proper party to institute action to prevent public nuisance by proposed enlargement of freight depot. *Hickory v. R. R.*, 141—716.

State is proper party to complain of wrong done to its citizens by public nuisance, and court will act with great caution in interfering at suit of private citizens. *Pedrick v. R. R.*, 143—485.

One who ships his goods to be sold for his benefit by consignee, is proper party to suit for penalty for delay. *Rollins v. R. R.*, 146—153.

When consignee is not required to pay for freight till it reaches its destination, consignor is "party aggrieved" in action for penalty for delay in shipment. *Davis v. R. R.*, 147—69.

See also: *Mfg. Co. v. R. R.*, 149—262; *Reid v. R. R.*, 149—425.

PARTITION.

Possession of dead body for purpose of burial belongs, in absence of testamentary disposition, to surviving husband or wife or next of kin, and when widow lived with husband at time of his death, her right is paramount to that of next of kin. *Kyles v. R. R.*, 147—398.

Where railroad company has entered upon land for its purposes, permanent damages, including recovery for entire wrong,—past, present and prospective,—should be had in one action and all parties who have any interest in land should be joined. *Porter v. R. R.*, 148—566.

Where plaintiff had actual possession of land burned and claimed it as her own, the alleged defective links in her paper title would not necessarily bar recovery. *Thornton v. R. R.*, 150—692.

Who not necessary.—Mortgagor who sells equity of redemption, after prior mortgage, not necessary party to foreclose. *Bernard v. Shemwell*, 139—446.

Neither heirs of mortgagor, who has sold equity of redemption; nor personal representative, nor his wife, necessary parties in action to foreclose. *Ibid*, 139—447.

PARTITION.

No legal partition can be made between tenants in common without deed, and doctrine of part performance insufficient to prevent operation of statute. *Rhea v. Craig*, 141—602.

Exceptions to report.—Exceptions to report of commissioners in partition proceedings should be filed within 20 days after their report is filed, but amended exceptions may be filed after that time, and clerk, upon good cause shown, may extend the time. *McDevitt v. McDevitt*, 150—645.

Owerty.—Payment of some of owerty money for his wife to equalize partition, would not create a resulting trust in favor of husband, for law presumes he intended it as a benefit or gift to his wife, noth-

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ing else appearing. *Sprinkle v. Spainhour*, 149—226.

PARTNERSHIPS.

What constitutes? *Walker v. Miller*, 139—448.

Deed to partnership in which partners are not named, is valid. *Ibid*, 139—453.

Execution of note under seal in name of partnership, by a member of the firm, is the contract of the firm. *Cowan v. Cunningham*, 146—453.

One partner may execute chattel mortgage on partnership goods to secure firm debt. *Odom v. Clark*, 146—550.

Where one agrees to buy half interest in a stock of goods of another, who agrees to assign the interest purchased, equity regards the assignment as being made as of the date of payment. *Godwin v. Cotton Mills* 147—233.

Dissolution.—In absence of stipulation to contrary, death of partner works immediate dissolution of partnership. *Walker v. Miller*, 139—448.

Upon death of partner, title to assets vests in surviving partner to close up partnership business, pay debts and turn over to personal representative share of deceased partner, *Ibid*, 139—448.

When one partner brings suit against his copartners for account, all parties are regarded as actors, and judgment should settle partnership concerns between all partners, as if each was a complainant in a suit against his copartners. *Emry v. Chappell*, 148—331.

Notice of withdrawal.—Where plaintiff had dealings with defendant partnership, retiring member should give plaintiff notice of his withdrawal. *Drewry v. McDougall*, 145—287.

When ostensible or known partner retires from a firm which continues the business, in order to protect him from liability for future obligations of the partnership,

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proper notice of his retirement must be given. Publication in newspaper 60 days and copy of notice mailed to creditor, sufficient. *Strauss v. Sparrow*, 148—311.

Rights of partners.—One partner during continuance of partnership cannot ordinarily bring trespass against other on account of partnership property, unless it be destroyed or beyond reach of complaining party. *Ledford v. Emerson*, 140—288.

Action lies in favor of one partner against another where partnership has terminated and nothing remains but to pay over amount due. *Ibid*, 140—288.

During continuance of partnership one partner cannot sue another on any special transaction which may be made an item of charge or discharge in general partnership account. *Ibid* 140—288.

Plaintiff entitled to arrest and bail against his copartner when facts bring the claim within statute. *Ibid*, 140—288.

Where it was agreed that one should apply for patent on article and another should construct a model and make certain advancements, this was not in nature of condition precedent, but obligation for breach of which, if not properly explained, plaintiff could be held responsible in taking partnership account. *Gilbert v. Machine Co.*, 147—314.

Partner excluded from firm by illegal acts of copartners is entitled to an account for profits and to his share of them until partnership is legally dissolved, and is entitled to decree of dissolution on ground of illegal exclusion from business. *Ibid*, 147—314.

Passenger.

See Railroads, failure to stop at station, passengers and premises; Carriers, discriminations; Negligence; Street Railways.

Paupers.

See Costs, in forma pauperis.

PAYMENT.

PAYMENT.

Recital in deed of payment of consideration, when not conclusive. *Campbell v. Everhart*, 139—503.

Recital of payment of consideration in deed controls in absence of evidence to contrary. *Griffin ex parte*, 142—117.

See also: *Faust v. Faust*, 144—383; *Satterfield v. Kindley*, 144—458.

Presumption of payment arises only between executor and legatee, debtor and creditor. *Outlaw v. Garner*, 139—190.

Acceptance of draft from debtor does not merge or operate as payment unless expressly agreed. *Chemical Co. v. McNair*, 139—326.

See also: *Buggy Co. v. Dukes*, 140—393.

Indulgence, or extension of time for payment, constitutes valuable consideration. *Ibid*, 139—326.

Where defendant receives payment of accounts secured by lien bonds assigned to plaintiff, he may recover. *Ibid*, 139—326.

Taking negotiable security for open account suspends right of action till maturity of note and it must be surrendered for plaintiff to sue on original cause of action. *Buggy Co. v. Dukes*, 140—393.

Where administrator is distributee, he and his bond liable for excess if he pays out or retains more than due him. *Caviness v. Fidelity Co.*, 140—58.

Sending check "in full of account," not inclusive of amount claimed by plaintiff, which he received, endorsed and kept money, evidence sufficient to go to jury upon intent of full payment. *Armstrong v. Lonon*, 149—435.

When insured files claim for sickness up to a fixed date and executes receipt for such amount, language will be restricted to amount then due, and not extended to cover claim for indemnity for future sickness. *Moore v. Casualty Co.*, 150—155.

While burden of proof to show payment is upon grantee in pos-

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session of lands under contract to convey, when both parties are dead, and grantee and those claiming under him have been in possession for 28 years, evidence of payment is sufficient for jury which shows that bond for title and note of less amount, wrapped in it, with payee's signature to note cut out, were found among papers of deceased payer, written upon same kind of paper, and witnesses by same person. *Pool v. Anderson*, 150—625.

Application of.—Not necessary for buyer to see to application of money paid to agent or trustee. *Rogerson v. Leggett*, 145—12.

When agent has received money from one in payment of debt due principal, he may not repudiate agent's act and apply money as payment on debt. *Supply Co. v. Dowd*, 146—194.

When bond was given by debtor, endorsed by surety, providing for payment of \$1,000 on debts then due or which might be received by obligee, subsequent payment of \$700 should be credited upon bond, and not to pay debts received after date of bond. *Shoe Co. v. Peacock*, 150—547.

Purchaser of bonds issued to pay necessary public expense need not see to application of proceeds. *Hightower v. Raleigh*, 150—572.

Payment must always be applied first to extinguish the interest, and remainder only upon principal. *Riddle v. Milling Co.*, 150—690.

Money had and received.—Where higher charges was paid than was charged other shippers, payment is not considered voluntary and excess may be recovered, though not protested. *Lumber Co. v. R. R.*, 141—171.

Amount overpaid on freight shipment draws interest. *Ibid*, 141—171.

Partial.—To arrest the running of the statute, payment should be of such a nature and made in such a way as to imply that debtor acknowledged debt as still existing and promises directly and unequiv-

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cally to pay same. *Supply Co. v. Dowd*, 146—196.

Part payment takes a case out of the statute generally when payment was intended as an acknowledgement of greater debt, but if it was not in the mind of debtor to do this, the statute, having begun to run, will not be stopped by reason of such payment. *Ibid*, 146—197.

Tender of.—When correct amount due by plaintiff on his note, secured by mortgage, was neither admitted nor shown, and could not be ascertained till questions involving quantity of land for purchase price of which notes were given, tender of payment was unnecessary. *Lance v. Rumbough*, 150—25.

Where plaintiff by a written contract agreed to purchase interest of defendant and other heirs if they would sign deed, and they refused to sell and plaintiff would not take defendant's interest alone, specific performance does not lie where she has not tendered defendant's part of purchase price. *Mitchiner v. Wallace*, 150—642.

Voluntary.—Voluntary payment with knowledge of all the facts can not be recovered, even when there was neither debt nor liability. *Jones v. Assurance Soc.*, 147—544.

Penal Actions.

See Register of Deeds; Railroads, delayed and damaged shipments; Telephone and Telegraph Companies.

PENALTIES.

Against public officers.—Action against Register of Deeds, and his surety, abates upon death of officer. *Wallace v. McPherson*, 139—297.

In action against Register of Deeds to recover penalty for wrongfully issuing marriage license, evidence that he did not know bridegroom, or young lady, and made no further inquiry of any one, was not a reasonable inquiry. *Morrison v. Teague*, 143—186.

PENALTIES.

By whom brought.—Action for penalty under Rev. 2631, is for person who is interested in having goods shipped, and agent or attorney for attaching creditor and surety on bond has no such right. *McRackan v. R. R.*, 150—332.

Common Carriers.—Where carrier requires payment of charges upon entire shipment, though part of it is short and not delivered, constitutes overcharge under Rev. 2641, for which penalty lies. *Cottrell v. R. R.*, 141—383.

A railroad owes it as a common law duty to deliver freight upon tender of lawful charges by consignee, and in absence of conflicting regulation by Congress, Revisal section 2633, is constitutional. *Harrill v. R. R.*, 144—532.

In action to recover penalty for refusal to deliver interstate shipment, upon tender of charges by consignee, no defense that agent did not know correct amount of charges because of defendant's failure to file schedule of rates, under interstate commerce act, or that bill of lading showing charges did not accompany shipment. *Ibid*, 144—532.

Legislature may impose penalty for failure of telegraph company to deliver interstate message. *Ibid*, 144—538.

Railroad not liable for penalty for failure to furnish cars within time limited in Rule 9 of Corporation Commission. *McDuffie v. R. R.*, 145—398.

In action for penalty for delayed shipment, "party aggrieved" is one whose legal right is denied, though defendant did not know of facts giving plaintiff right to sue. *Cardwell v. R. R.*, 146—220.

Corporation Commission is not required to institute action to recover penalty provided in Revisal 1086, simply because citizen feels himself aggrieved and makes complaint, but it should make investigation. *Hardware Co. v. R. R.*, 147—490.

Revisal 3073 providing for testing

PENALTIES.

weights and measures by standard-keeper, or imposing penalty for "using, buying or selling," by other than standard weights and measures, does not apply to railroad companies using scales to weigh shipments. *Nance v. R. R.*, 149—373.

Failure to deliver freight shipped from Baltimore to Durham is not an interstate matter, and where transportation is completed and delay occurred in warehouse in Durham, Rev. 2633 applies. *Hockfield v. R. R.*, 150—422.

Penalty for refusal to receive freight lies where shipment was intrastate, but carrier as such was engaged in interstate commerce. *Garrison v. R. R.*, 150—592.

Under the constitutional prohibition against imposition of excessive fines, the court has power, and in a clear case, it would be its duty to declare invalid a statute imposing penalties so enormous in amount and out of proportion to gravity of offense and its effect upon private and public interest as to come within prohibition of constitution. *Ibid.*, 150—593.

Where consignee had refused to receive and unload cars, thereby causing defendant's yards and tracks to be congested, this was no reason for refusing to receive a shipment to him from another place. *Ibid.*, 150—584.

Constitutionality of enactment.—Legislature may give "penalties" either in whole or in part to whomsoever shall sue for same, but statute giving to informant half of fine imposed is unconstitutional. *State v. Maultsby*, 139—503.

Sections 2634 and 2644, of Revisal are constitutional. *Iron Works v. R. R.*, 148—470.

Revisal 2631, providing penalty for refusal to receive freight is valid, though the destination of shipment is a point in another state. *Reid v. R. R.*, 149—445.

Construed.—Penal statutes are strictly construed and he who sues for penalty must bring his case

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clearly within language and meaning of law. *Cox v. R. R.*, 148—460.

Evidence.—In action for penalty under ranging act, burden upon defendant to show estate in land of a year or more, and their bona fide claim to title not sufficient. *Rose v. Davis*, 140—266.

In action for value of damaged shipment, and penalty, it is necessary to establish right to full amount of claim as condition precedent to right to recover penalty. *Albritton v. R. R.*, 148—488.

Carrier may show, in action for penalty for refusal to receive shipment, any legal defense or excuse. *Hardware Co. v. R. R.*, 150—706.

To recover penalty for failure of carrier to receive freight, not necessary that pecuniary injury be suffered. *Reid v. R. R.*, 150—765.

Where plaintiff tendered for shipment and offered to prepay freight, and shipment was refused because agent did not know rate, and plaintiff requested agent "when he got ready to ship to phone them and they would come over and pay freight due," penalty allowed, as this had effect of a new tender and refusal each day. *Ibid.*, 150—755.

Per Capita and Per Stirpes.

See *Heirs; Estates; Wills*.

Peremptory Challenges.

See *Jury, challenges*.

Performance.

See *Contracts, performance; Specific Performance*.

PERSONAL LIBERTY.

Legislature cannot change rule of evidence so as to deprive one of a property right guaranteed by Constitution. *State v. Williams*, 146—619.

Statute prohibiting carrying of more than half a gallon of liquor in Burke County in one day, without other evidence of a sale, unduly restricts right of citizen to use of his property. *Ibid.*, 146—635.

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PERSONAL PROPERTY.

The fiction of personal property being considered as belonging to domicile of owner, applies only to distribution of assets of one deceased. *Jones v. Layne*, 144—602.

Personal Property Exemptions.

See *Homestead and Exemptions*.

PETITION TO REHEAR.

Decision of supreme court cannot be reviewed by second appeal; only way is by petition to rehear. *Holland v. R. R.*, 143—437.

When petition to rehear is docketed the case is again in supreme court for argument, and motion for new trial for newly discovered evidence can be made here; but mere application to rehear, not ordered docketed by justices to whom it is presented, does not put case in supreme court. *Smith v. Moore*, 150—159.

An order to docket petition to rehear is based on error of law in previous decision, and certificate to that effect will not be made merely to permit a motion, which can be made in court below. *Ibid*, 150—159.

Physicians.

See *Evidence, expert; Damages, measure of*.

PILOTS.

State has right to regulate pilotage, and provide for payment of pilots. *St. George v. Hardie*, 147—94.

Laws respecting pilotage are not in derogation of nor do they proceed from common law rights and are liberally construed. *Ibid*, 147—95.

Statute regulating pilotage is constitutional. *Ibid*, 147—100.

Selection by a commission of persons qualified to act as pilots, is not violative of Art. I, secs. 7 and 31 of our constitution, prohibiting exclusive emoluments or privileges. *Ibid*, 147—96.

PLATS.

See *Evidence, maps*.

PLEADINGS.

PLEADINGS.

Generally.—Estoppel is sufficiently pleaded where all facts going to make up estoppel are set out in pleadings, though not claimed as estoppel in terms. *Alston v. Connell*, 140—485.

One who demands equitable relief must specially allege the facts upon which he seeks aid of court. *Buchanan v. Herring*, 141—39.

Sufficient in condemnation proceedings if facts alleged plainly show that petitioner has been unable to acquire title, and why. *Durham v. Riggsbee*, 141—128.

Allegation "that petitioner has been unable to acquire title," necessary, but not an issuable fact for jury. *Ibid*, 141—130.

In action for settlement, sufficient to allege breach of duty by administrator, failure to file final account and to fully settle. *Mann v. Baker*, 142—235.

Complaint alleging negligence generally, demurrable. *Thomasson v. R. R.*, 142—318.

Court will give any relief appropriate to complaint, proofs and finding of jury, without reference to prayer for relief. *Davis v. Wall*, 142—451.

In action for breach of covenant of seisin, averment of eviction or threatened litigation unnecessary. *Eames v. Armstrong*, 142—507.

Fraud must be clearly and directly pleaded. *Merrimon v. Paving Co.*, 142—540.

Matters in mitigation of damages may be shown under general denial and need not be specially pleaded. *Creighton v. Water Comrs.*, 143—171.

Where this court on former appeal construed pleadings as raising certain issues, and parties went to trial on the pleadings, too late on this appeal to raise question that issues are not presented. *Bank v. Hollingsworth*, 143—520.

Every reasonable intentment indulged in favor of pleader; and pleadings inartificially drawn are

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sufficient if from any portion or to any extent it can be gathered that facts which constitute cause of action have been alleged. *Blackmore v. Winders*, 144—212.

An answer which contains nothing to aid allegations of complaint, does not preclude motion to dismiss. *Painter v. R. R.*, 144—436.

When plaintiff sues upon contract and defendant denies its existence, he can avail himself of statute of frauds, without specially pleading it. *Winders v. Hill*, 144—614.

Defective statement in pleading is waived by not demurring or moving to make allegations more specific. *Hough v. R. R.*, 144—704.

Where complaint alleges title and right of possession, reply showing how they were acquired may be filed, though there was no counterclaim alleged. *White v. Carroll*, 146—234.

Plaintiff is entitled, irrespective of his prayer for relief, to any remedy to which the facts alleged and proven, entitle him. *McCulloch v. R. R.*, 146—316.

Judicial notice is not taken of statutes of another State. They must be pleaded and proven. *Hall v. R. R.*, 146—351.

Pleadings should be liberally construed for purpose of determining its effect, with view to substantial justice between the parties. *Jones v. Henderson*, 147—122.

Admissions in.—Exception to admission against defendant of certain sections in original answer, not tenable. *Norcum v. Savage*, 140—472.

Plaintiff may offer as an admission a section of answer containing allegation of a distinct separate fact relevant to inquiry, though only part of entire paragraph, without introducing explanatory matter. *Sawyer v. R. R.*, 145—24.

In action for trespass for cutting timber, when plaintiff makes necessary allegation of title, which is denied by answer, it is not an admission of plaintiff's title for de-

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fendant to assert affirmative relief "that plaintiff be decreed a trustee for his benefit." *Johnson v. Lumbar Co.*, 147—252.

Amendment.—Where complaint in action on specific contracts fails to allege full performance by plaintiff, proper to amend. *Tussey v. Owen*, 139—457.

Complaint alleging ownership and wrongful detention, may be amended by setting out fraud and deceit. *Joyner v. Early*, 139—49.

Amendment of complaint is in sound discretion of court and not reviewable. *Ibid*, 139—49.

Supreme court may authorize amendment of pleadings. *Bonner v. Stotesbury*, 139—4.

Will not exercise power where amendment would, perhaps, present case substantially different from one tried below. *Ibid*, 139—4.

Statement in warrant to recover penalty under statute, that amount claimed is "due by penalty," is insufficient, but may be amended. *Stone v. R. R.*, 144—220.

Where plaintiff sets up in his complaint for trespass the deed under which he claims, he cannot claim some other description not included in his deed, without amendment. *Fincannon v. Suderth*, 144—587.

Amendment of warrant by inserting words of the statute is in discretion of court, especially when proceeding was begun in justice's court. *Laney v. Mackey*, 144—630.

After final judgment in supreme court, too late to set up new cause of action by amendment of complaint. *Tussey v. Owen*, 147—337.

Superior and supreme court may permit complaint to be amended to conform to fact proved, but slight variance should be disregarded. *Andrews v. Grimes*, 148—438.

If plaintiff is dissatisfied with ruling of judge in sustaining demurrer to complaint, he should appeal instead of amending it, and he may not thereafter assign it for error on appeal. *Rice v. McAdams*, 149—30.

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Court in its discretion may allow amendment of pleadings, but not to set up a cause of action wholly different, and may restrict amended answer as to plea of statute of limitations. *Hockfield v. R. R.*, 150—421.

Proceedings of court of record are in fieri, under absolute control of judge, subject to be modified or amended at any time before expiration of term in which they are had or done. *Cook v. Tel. Co.*, 150—429.

Confession and avoidance.—Defense in nature of confession and avoidance must be specially pleaded. *Smith v. Newberry*, 140—385.

When answer admits facts which entitle plaintiff to recover, it is immaterial how or in what manner the admission is made. If by confession and avoidance, issue arises upon new matter alleged in avoidance, burden being upon defendant to show truth of new matter. *Eames v. Armstrong*, 142—507.

Defenses.—Defense that bond sued on was not listed for taxation, should be pleaded in answer. *Martin v. Knight*, 147—567.

In action for breach of contract for goods ordered, measure of damage is difference between what it would have cost plaintiff to carry out its part of contract and the contract price, and if defendant intended to rely upon fact that plaintiff could not have complied with its contract, or that it was otherwise profitably employed during time it was engaged in filling this order, this defense should have been alleged and proved. *Springs Co. v. Buggy Co.*, 148—534.

Statute of frauds to be availed of as a defense must be pleaded. *Teal v. Templeton*, 149—34.

Abandonment, condonation and recrimination as a defense to action for divorce, should be pleaded in answer. *Kinney v. Kinney*, 149—325.

Defense of statute of limitations is personal to defendant in interest

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and must be pleaded by him. *Hildebrand v. Vanderbilt*, 147—641.

Burden of defense of contributory negligence is upon defendant to set it up and prove it on trial, and it is proper to refuse to charge as matter of law that plaintiff was guilty of such negligence. *Matthews v. Peterson*, 150—138.

Filed.—Refusal of judge to permit answers to be filed, in his discretion, is not reviewable, when discretion is not abused. *Clark v. Machine Co.*, 150—375.

In evidence.—Introduction of modified admission of one allegation of complaint cannot have the effect of changing entire theory of case. *Wallace v. R. R.*, 141—647.

In offering a pleading in evidence, one cannot so disconnect the words of the pleader as to destroy the sense in which they were used. The purpose of a trial is to show forth the truth. The language used by parties in pleading or elsewhere must be given in evidence in such a way as to enable the jury to see what, by reasonable interpretation, they intended to say or did say. *McCaskill v. Walker*, 147—198.

When issuable matters are not controverted in pleadings, it is unnecessary to introduce them in evidence, but when they are independent of and collateral to issues raised, they are only available as evidence when properly introduced. *Ibid*, 147—200.

Proper to refuse to admit part of paragraph unless all is offered, where it was so connected that the part not offered was necessary to explain that which was offered. *Rushing v. R. R.*, 149—160.

Portion of answer containing an allegation or admission of a distinct or separate fact relevant to the inquiry, may be put in evidence, though it is only a part of an entire paragraph, without introducing qualifying or explanatory matter inserted by way of defense, which does not modify or alter the fact

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alleged. *Wade v. Contracting Co.*, 149—178.

Statement in complaint and answer is some evidence that line is owned by telegraph company over which message was forwarded by it, when complaint contains distinct allegation of ownership, which answer does not deny. *Willis v. Tel. Co.*, 150—323.

When paragraphs of answer, put in evidence by plaintiff, are complete in themselves, it is not error to exclude other paragraphs offered by defendant containing distinct averments in its own interest. *Hockfield v. R. R.*, 150—421.

Prayer for relief.—When a money judgment is demanded, right of removal is determined by sum demanded, as appears by record at time petition is filed. When amendment is made, last sum demanded "is matter in dispute." *McCulloch v. R. R.*, 149—310.

Special pleas.—Justification, if to be availed of as a defense, must be pleaded. *Logan v. Hodges*, 146—43.

Correct construction of Rev. 2628, forbidding passengers to ride on platform is not clear, and while we do not hold that it is necessary for defendant to plead the statute as an affirmative defense, yet the non-liability of carrier, when it is relevant, cannot well be presented under the general issue. *Wagner v. R. R.*, 147—329.

Question of abandonment affecting validity of deed of feme covert without husband joining, is evidential matter and arises only when objection is made thereto, and need not be set up by plea. *Witty v. Barham*, 147—481.

Variance.—In action demanding judgment for title and possession of land, when pleadings and evidence show that direct action to charge land with indebtedness should have been brought, and no motion to amend pleadings was made, nonsuit proper. *Henderson v. Eller*, 147—582.

Where affidavit for attachment

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alleges breach of contract, and proof shows a tort, if there is a variance it cannot be taken advantage of by motion to nonsuit. *Edwards v. Erwin*, 148—433.

Superior and supreme court may permit complaint to be amended to conform to fact proved, but slight variance should be disregarded. *Andrews v. Grimes*, 148—438.

Allegation of contract to deliver goods by November first is not sustained by proof of a delivery November tenth, and where plaintiff purchased of defendant by correspondence a lot of salt, requesting its delivery at certain time, and defendant would not promise delivery because of uncertainty of schooner shipments, action for damage will not lie. *Sumrell v. Salt Co.*, 148—555.

Verification.—Knowledge of adultery need not be alleged in complaint, but in verification, and when proper affidavit is made, court acquires jurisdiction. *Kinney v. Kinney*, 149—325.

POLICE POWER.

Seizure and sale of nets under Acts of 1905, chap. 292, constitutional exercise of police power. *Daniels v. Homer*, 139—219.

State has police power to fix age at which children may be employed in mills. *Starnes v. Mfg. Co.*, 147—558.

Municipal corporations can only exercise such police powers as are granted by their charters, and all fair and reasonable doubts as to whether such powers have been so conferred are resolved by the courts against their being exercised. *State v. Dannenberg*, 150—301.

POLICE REGULATIONS.

Revisal 3051 prohibiting discharge of sewage into any stream from which public drinking supply is taken, without reference to distance of such discharge from point of intake, is constitutional. *Durham v. Cotton Mills*, 141—616.

POLICE REGULATIONS.

Rules and regulations of sanitary committee of county with reference to compulsory vaccination, when reasonable and relevant to purpose, are a valid exercise of authority. *Morgan v. Stewart*, 144—424.

See Municipal Corporations, liabilities of; Bill Boards; Intoxicating Liquors; Hunting and Fishing.

Policy.

See Insurance.

POSSESSION.

Generally, those occupying parental and filial relations, possession presumed permissive, not adverse. *Campbell v. Everhart*, 139—503.

When possession is wholly restored to him who gave it, estoppel of tenancy ceases. *Ibid*, 139—502.

In proceeding relating to entry on vacant lands, plaintiff showed possession only between 1874-6, nor any deed from anyone for any part of land covered by entry except three deeds which failed to connect plaintiff with land, properly dismissed. *Johnson v. Wescott*, 139—27.

Where title out of state, and possession for more than thirty years, grant presumed from state and not necessary to show connection between successive occupants. *Jennings v. White*, 139—26.

One having neither possession nor right to land, cannot maintain trespass. *Latham v. Lumber Co.*, 139—9.

When there is a sale or gift, or a transfer in any other mode provided by law, the continuity of possession is preserved and the idea of abandonment is necessarily excluded. *Church v. Bragaw*, 144—130.

Entry by one upon land described in deed is presumed to have been under and by virtue of such title, and from the time such title is acquired. *Chatham v. Lunsford*, 149—365.

Freehold may be made to commence in futuro, and reservation of title during grantor's life was a

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reservation of the possession. *Dick v. Miller*, 150—64.

Where third person cuts timber without knowledge of defendants, this would not affect their claim or impair their rights, but otherwise without knowledge of defendants, as acting for plaintiff. *Hill v. Bean*, 150—438.

See, also, Adverse Possession; Ejectment; Estates.

POWERS.

Creation of.—No technical language need be used in the creation of a power. Any words definite enough to disclose its nature, the donee, or the person by whom it is to be exercised, and its objects, are sufficient; and so with a power of sale, it may be created by express words or implication of law. *Powell v. Wood*, 149—239.

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Generally.—Where issue of title raised in processioning proceeding, issue should be transferred to superior court for trial. *Stanaland v. Rabon*, 140—202.

Generally when the injunctive relief sought is itself the main relief, court will continue it to hearing. *Hyatt v. DeHart*, 140—270.

Injunction against prosecution of enterprises tending to develop resources of the country, will ordinarily be refused. *Ibid*, 140—270.

Pleadings in justice's court, practice. *Smith v. Newberry*, 140—385.

Practice in motion in supreme court for new trial for newly discovered evidence. *Crenshaw v. Street Railway Co.*, 140—192.

Equitable defense cannot be proven unless set up in answer. *Alley v. Howell*, 141—115.

Report of commissioners in condemnation, assessment of damages, exception and appeal, practice. *Durham v. Riggsbee*, 141—128.

Motion to dismiss in justice's court not abandoned by being denied and proceeding with trial and

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appealing to superior court. *Woodward v. Milling Co.*, 142—100.

Motion to reinstate upon docket denied, where all matters in controversy decided at former term. *Arrington v. Arrington*, 142—130.

Where motion to nonsuit denied below, and sustained in supreme court, duty of superior court to dismiss upon coming down of judgment. *Hollingsworth v. Skelding*, 142—246.

In action upon judgment of sister State, defendant may set up fraud and such equitable defense as may be made in justice's court. *Levin v. Gladstein*, 142—482.

Motion to correct judgment of superior court cannot be made in supreme court, where upon appeal that court had heard and determined the case. *Moseley v. Johnson*, 144—277.

While hypothetical questions involving negligence and contributory negligence conclude with a direction to the jury to answer the first issue "Yes," and second issue "No," the most satisfactory way is to direct the instruction to each issue separately. *Overcash v. Electric Co.*, 144—586.

Where one appears specially in justice's court and moves to dismiss, and motion is denied, he should preserve his point by exception and proceed to trial. He cannot after judgment, enter special appearance by appeal. *Allen v. R. R.*, 145—41.

One cannot demur to plaintiff's cause of action and call in aid the averments of his own pleading, unless they admit allegations of complaint. *Oldham v. Rieger*, 145—259.

Proper method to impeach judicial proceedings for fraud is by civil action, and not by motion. *Tuttle v. Tuttle*, 146—492.

No case on appeal is necessary when judgment below is rendered upon case agreed or demurrer, or from order granting or refusing injunction, as pleadings and affidavits constitute record proper. *Wallace v. Salisbury*, 147—59.

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Special proceeding cannot be assailed by an independent action for mere irregularity. Plaintiff should have proceeded by motion in the cause to set aside judgment as to her. *Rackley v. Roberts*, 147—204.

Where plaintiff alleged fraud and collusion, and may be able to establish this charge at next trial, and when defendant failed to renew motion to nonsuit, at close of all evidence, supreme court will not dismiss action but award a new trial. *Ibid*, 147—209.

After final judgment in supreme court it is too late to set up a new cause of action by amendment of complaint. *Tussey v. Owen*, 147—337.

If issues of fact are to be tried, or case has been improperly brought before judge at chambers, it should be transferred to superior court for trial at term, and not dismissed. *Coleman v. Coleman*, 148—301.

Judgment upon counterclaim does not lie because no reply was filed in justice's court, as pleadings in that court are oral. *Teal v. Templeton*, 149—34.

If partition sale was made pursuant to irregular judgment, and is for that reason to be set aside, court would be compelled to administer the equities growing out of the transaction, subrogating purchasers to rights of creditors, and this would necessitate having all of them before the court. *Lanier v. Heilig*, 149—387.

After merits of case have been passed upon, appeal had and determined by supreme court, interpleader by new parties should not be allowed, but independent action should be brought. *Harrell v. Hagan*, 150—243.

Not necessary on appeal, for one to tender an issue, when all evidence relevant to it has been excluded. *Moore v. Lumber Co.*, 150—269.

When judge sets aside finding upon issue of damages and ordered new trial, proper course is to ex-

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cept and not appeal. *Billings v. Observer*, 150—542.

When judge charges jury to find for defendant upon an issue, if they believe the evidence, better practice is to except to charge and appeal, than to do so upon exceptions to the evidence and refusal of motion for judgment upon whole evidence. *Supply Co. v. Machin*, 150—743.

Not encouraged.—Successful party may note his exceptions and preserve them by appeal in case of reversal in supreme court, but practice is not encouraged. *Metal Co. v. R. R.*, 145—300.

Rehearing.—Upon judgment given by magistrate in absence of party, affidavit to open and rehear case must be made in ten days after rendition of judgment. *Bullard v. Edwards*, 140—644.

Where magistrate made *ex parte* order for rehearing, upon affidavit served after ten days from rendition of judgment, plaintiff waives no rights by asking continuance. *Ibid*, 140—644.

Second rehearing in supreme court is only permissible when, on first rehearing court has reversed or materially changed the opinion that was sought to be reheard. *Nelson v. Hunter*, 145—334.

Matter of law determined on appeal will be reviewed only on a rehearing and cannot be again brought in question by another appeal in same case. *Britt v. R. R.*, 148—42.

PRAYERS FOR INSTRUCTION.

Generally.—Judge not obliged to repeat instructions already given, even when specially asked to do so in prayer. *Sprinkle v. Wellborn*, 140—165.

Court not required to give instruction in language of prayer, but it is sufficient if instruction given covers principle involved. *Brown v. Power Co.*, 140—333.

Prayer correct in itself, and sustained by evidence, should be given in form requested, or substantially so. *Horne v. Power Co.*, 141—50.

PRAYERS FOR INSTRUCTION

Time within which special instructions should be requested is discretionary with judge, but he should afford reasonable time in which to prepare and present them. *Craddock v. Barnes*, 142—90.

Requests for special instructions cannot be filed after argument begins without leave of court. *Ibid*, 142—90.

Where court takes recess at close of evidence, special prayers are in time if asked before argument begins upon convening of court. *Ibid*, 142—99.

One's silence, when judge omits to state evidence or charge in any particular way, waives right to object if not called to his attention at time. *Davis v. Keen*, 142—496.

Sufficient if charge substantially embraces prayers of appellant, so far as they are correct, though not verbatim. *S. v. Burnett*, 142—578.

Duty of trial judge to give requested prayers for special instruction, correct in itself, material to the case and based upon certain phases of facts reasonably assumed upon the evidence, and general and abstract charge of law is not sufficient. Error is not cured by giving such requested charge upon unanswered issue concerning which instruction was not asked. *Baker v. R. R.*, 144—37.

When prayers are presented in apt time, refusal of judge to consider them is error, even if adjournment is necessary to give time therefor; but new trial will not be granted when it appears from charge that there was no error of which either party could complain. *Moseley v. Johnson*, 144—258.

Prayer tendered in apt time and supported by evidence bearing upon legal effect of facts, should be given. *Allen v. Traction Co.*, 144—238.

If special instruction is asked as to particular phase of case presented by evidence, it should be given in substantial conformity to prayer. *Patterson v. Lbr. Co.*, 145—45.

PRAYERS FOR INSTRUCTION.

It is sufficient if court in general or special instructions has stated special request in form equally as favorable to appellant. *Horton v. R. R.*, 145—132.

Where improper assumptions are stated in prayers, and evidence is to the contrary, court is not required to correct the prayer. *Edwards v. Tel. Co.*, 147—129.

Not necessary that prayer for instructions be given in very words in which it is expressed. *S. v. Dobbins*, 149—469.

When plaintiff fails to ask for special instruction in writing in apt time, refusal of judge to give correct instruction, when tendered too late, is not reviewable. *Nail v. Brown*, 150—535.

Erroneous.—Prayer for court to instruct jury if they believe facts grouped therein, there was no negligence, is objectionable unless all material elements of case are included. *Ruffin v. R. R.*, 142—120.

Must be requested.—Exception that court failed to instruct jury upon certain phase of case, cured unless appellant asked instruction to that effect. *Lyles v. Carbonating Co.*, 140—25.

If one desires more specific instructions than those given, he must ask for them and not wait till verdict has gone against him. *Simmons v. Davenport*, 140—407.

See *S. v. Martin*, 141—832; *Ives v. R. R.*, 142—131; *S. v. Bohannon*, 142—697; *Gaither v. Carpenter*, 143—240; *S. v. Turner*, 143—641; *Nelson v. Tobacco Co.*, 144—418; *Gay v. Mitchell*, 146—510; *Gerock v. Tel. Co.*, 147—10.

Res ipsa loquitur is simply matter of evidence and to be availed of, appropriate prayer must be handed up in apt time. *Isley v. Bridge Co.*, 141—220.

Where judge fails to charge as to certain phase of case, his attention must be directed to omission by prayer, or failure to charge can not be assigned as error, unless he eliminates substantial part of it to

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prejudice of one party. *Rumbough v. Sackett*, 141—495.

Omission to charge upon given point not error unless there is prayer to instruct. *S. v. Worley*, 141—764.

Appellant should request judge to charge jury upon certain phases of evidence, or pray instructions, or question cannot be raised by motion to set aside verdict. *Pardon v. Paschal*, 142—538.

Mental anguish is more than mere disappointment or regret; it is a high degree of mental suffering. *Gerock v. Tel. Co.*, 147—6.

A mere "contention" made by counsel during the trial, is not equivalent to a request for instructions and is not a compliance with the statute. *Davis v. Stephenson*, 149—115.

When plaintiff fails to ask for special instruction in writing in apt time, refusal of judge to give correct instruction, when tendered too late, is not reviewable. *Nail v. Brown*, 150—535.

Preferences.

See Bankruptcy, voidable preference.

Premiums.

See Insurance, payment of premiums, assessments.

Prescription.

See Easements and Licenses; Roads and Streets.

PRESUMPTIONS.

Generally.—In absence of proof, court will assume that entry and survey conformed to statute and burden upon plaintiff to show prior entry invalid. *Frazier v. Gibson*, 140—272.

Generally, those occupying parental and filial relations, possession presumed permissive, not adverse. *Campbell v. Everhart*, 139—503.

Presumption that primary evidence injurious, where secondary evidence offered. *Yarborough v. Hughes*, 139—200.

PRESUMPTIONS.

Where foreign court had jurisdiction of subject matter and parties, this court, in absence of counter-vailing evidence, presumes that it proceeded regularly. *Wright v. R. R.*, 141—164.

In absence of fraud, delivery of policy is conclusive proof that contract is completed and premium received during good health. *Rayburn v. Casualty Co.*, 141—425.

In courts of general jurisdiction, regularity of judgments and jurisdiction presumed, and recitals of such facts are conclusive when collaterally attacked. *Settle v. Settle*, 141—553.

Sheriff's deed only presumptive evidence that notice to delinquent tax payer was given, but notice, required to be given by purchaser must be proved. *Matthews v. Fry*, 141—582.

When insanity is once shown to exist, presumed that it continues until there is evidence of restoration. *Beard v. Railroad*, 143—136.

Accident carries with it no presumption of employer's negligence. *Shaw v. Mfg. Co.*, 143—131.

In supreme court the presumption is against error of judge, and appellant, to succeed, must make it appear. *Bernhardt v. Dutton*, 146—209.

Where wrongful obstruction of street by steps has existed 30 years, city is presumed to have knowledge of it. *White v. Newbern*, 146—447.

Proceedings in former action presumed to be regular till contrary is shown. *Sutton v. Jenkins*, 147—16.

Presumption in favor of correctness of result of election as declared by proper officials, is final until reversed by judgment, after trial of issues brought to impeach it. *Wallace v. Salisbury*, 147—60.

It is presumed that authority of an attorney to represent his client continues till there is evidence of its revocation. *Bank v. Peregoy*, 147—295.

When a letter or telegram is received in due course of mail, purporting to be in response to a let-

PRESUMPTIONS.

ter or telegram previously sent by the receiver, it is presumptively genuine and admissible. *Edwards v. Erwin*, 148—432.

Presumption is that testatrix intended by her will to dispose of all of her property, and not die intestate as to any part of it. *Powell v. Wood*, 149—238.

Report of commissioners in division of land, presumed to have been duly recorded in clerk's office in accordance with order of court, in absence of proof to contrary. *Hill v. Lane*, 149—271.

The law presumes that this deed, proved, registered and offered in evidence by defendants, claiming under it, was executed and delivered at time it bears date, unless contrary be shown, and burden to show this is upon plaintiff. *Fortune v. Hunt*, 149—362.

Whenever the rules of evidence give to testimony the artificial weight of a presumption, the question whether such presumption is rebutted by parol evidence, introduced for the purpose, must go to the jury, unless the truth of such rebutting testimony is admitted. *Ibid*, 149—362.

Common seal being affixed is prima facie evidence that it was so affixed and mortgage was executed by proper authority. *Edwards v. Supply Co.*, 150—176.

Where will has not been found since its execution, there is a presumption of fact that it was destroyed by testator animo revocandi, but not when last seen in possession of third person. In re *Hedgepeth*, 150—251.

Presumption is in favor of regularity of conduct of authorities in ordering election. *Thrash v. Comrs.*, 150—694.

Of law.—Presumption of law that owner of negotiable note is bona fide holder. *Tyson v. Joyner*, 139—73.

In absence of proof to contrary, courts of our State will presume the common law to prevail in sister State. *Woods v. Tel. Co.*, 148—7.

PRESUMPTIONS.

When one has been discharged from asylum, law presumes in absence of evidence to contrary, that he was sane. *In re Thorp*, 150—491.

Sheriff's return showing service of process is prima facie sufficient till it is made to appear in some proper way that in fact there was no proper service. *Marler Co. v. Clothing Co.*, 150—521.

PRINCIPAL AND AGENT.

Generally.—One who deals with agent should ascertain scope and extent of his authority. *Bank v. Hay*, 143—326.

Authority to draw, accept or endorse bills, notes and checks not readily implied as incident to express authority of agent, but it may be implied if execution of paper is a necessary incident to business. *Ibid*, 143—326.

When agent makes contract without disclosing name of principal, he may claim all his rights if other party is not injured thereby. *Nicholson v. Dover*, 145—21.

Where one is general agent of another, who relies upon him as friend and adviser, and has entire management of his affairs, a presumption of fraud, as matter of law, arises from a transaction between them wherein the agent is benefited, and burden is upon him to show that transaction was open, fair and honest. *Smith v. Moore*, 149—197.

Acts of agent.—In action on breach of contract, declarations of defendant's president, in course of employment, specially deputed to make contract, competent. *Ives v. R. R.*, 142—131.

Contract under seal, must be in name of principal and purport to be his deed. In contracts not under seal, question of agency one of intent. *Hicks v. Kenan*, 139—337.

Local agent of foreign corporation, who is? *Higgs v. Sperry*, 139—299.

Court must be satisfied that agency has been shown, before what

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alleged agent said or did, competent. *Jackson v. Tel. Co.*, 139—347.

Evidence of agency for jury. *Ibid*, 139—347.

Where attorney speaks for client, or agent for principal in his presence, law regards client or principal as acting for himself. *Smith v. Moore*, 142—277.

Statement made by plaintiff's agent at time he took order, as to what contract was, is binding upon principal. *Typewriter Co. v. Hardware Co.*, 143—97.

To correct mistake in written policy, it must be alleged and shown that mistake was mutual, and when agent is of limited powers, must be shown that policy as claimed is one within power possessed by agent, express or implied. *Floars v. Ins. Co.*, 144—233.

Mistake of soliciting agent as to policy to be issued, which was contrary to rules of company and which it did not authorize, can not be imputed to company. *Ibid*, 144—233.

When agency has been proven without objection, declarations of agent while in prosecution of work, are competent. *Brickell v. Mfg. Co.*, 147—119.

As a general rule, an agent authorized to sell property, in absence of express limitation of his powers, is authorized to bind his principal by warranty. *Mfg. Co. v. Davis*, 147—269.

Where defendant agreed to furnish plaintiff a salesman to sell machines and they did not knowingly or negligently put off a bad servant on plaintiff, if salesman embezzled plaintiff's property it is his loss. *Slaughter v. Machine Co.*, 148—472.

To make a valid contract concerning land, not necessary for owner or principal to sign, but signature "thereto lawfully authorized," is sufficient, and in some cases though agent be acting for undisclosed principal. *Combes v. Adams*, 150—68.

Acts of a general agent, known

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as such, govern principal in all matters coming within legitimate scope of business to be transacted, although he violates his private instructions, unless known to person dealing with him. *Gooding v. Moore*, 150—198.

Testimony of agent as to what he did, as agent, is competent. *Hill v. Bean*, 150—437.

Where third person cuts timber without knowledge of defendants, this would not affect their claim or impair their rights, but otherwise if he was recognized by defendants as acting for plaintiff. *Ibid*, 150—438.

Where one attended sale of client's property, merely as attorney at law, and with no other powers, and he stated publicly that client had no interest in property about to be sold, client was not bound thereby. *Supply Co. v. Machin*, 150—744.

Unauthorized statement made by attorney at sale that his client claimed no interest in property being sold, incompetent as against client. *Ibid*, 150—745.

General manager has power to bind corporation by acts done in ordinary course of its business, but where he, without authority, attends sale of his company's property, his acts and declarations denying title of his company are not binding upon it. *Ibid*, 150—746.

Agent, compensation.—Broker who negotiates sale of property is not entitled to commission unless he finds a purchaser in situation ready and willing to buy upon terms of principal. *Trust Co. v. Adams*, 145—164.

Where broker tries to get better terms of payment from principal, fails to do so and land is withdrawn from sale, he may not then insist upon sale and commissions upon subsequently informing principal that sale was in fact effected in accordance with instructions. *Ibid*, 145—161.

Where agent for sale of land introduced to principal a prospective purchaser who secured option,

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which was subsequently renewed, and later on land was purchased, agent was entitled to commissions though discharged before title passed. *Kinsland v. Grimshaws*, 146—401.

One can not act as agent for both buyer and seller, when their interests are antagonistic, or when the terms of purchase are unsettled; and where one was agent to make sale of land and he was given extra commission by prospective buyer if he could sell land at advanced price, it was no fraud upon original principal. *Ibid*, 146—401.

In action by agent for commissions, evidence that agent's vendee soon after bought the property from the one to whom principal sold it, at price agreed on with agent, is competent to show that agent's customer was "able, ready and willing." *Reams v. Wilson*, 147—306.

Agreement between principal and agent that latter is to have all over a certain amount as commissions for making sale, is a valid express contract and he may recover, upon obtaining purchaser "ready, able and willing" to buy. *Ibid*, 147—305.

Del credere.—Agent to sell goods on del credere commission is not real party in interest, and can not maintain in his own right or by construction, as trustee of express trust, an action to recover for goods sold. *Chapman v. McLawhorn*, 150—167.

Duties of agent.—Agent can not, in law, represent himself and principal where their interests conflict, and without knowledge of latter. *Swindell v. Latham*, 145—151.

Agent must give to principal notice of all facts relative to business entrusted to him, which have come to his knowledge and may materially affect principal's interest. *Trust Co. v. Adams*, 145—165.

Liability of principal.—Paper deposited with bank for collection, payable at another place, bank at other place is agent of depositor and first bank liable for misconduct of subagent only where it fails

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to use due care in his selection. *Bank v. Floyd*, 142—187.

Contract that out of town items are remitted at owner's risk until bank receives full actual payment, does not relieve it from its own negligence, but only from misconduct of subagents properly selected. *Ibid*, 142—187.

Principal liable on contracts duly made by agent with third persons, when agent acts within scope of actual authority; when contract is unauthorized but has been ratified; when agent acts within scope of apparent authority, unless third person has notice that agent is exceeding authority. *Bank v. Hay*, 143—326.

Principal is liable where agent acts within scope of apparent authority, if liability would attach to principal if he were in place of agent. *Nicholson v. Dover*, 145—21.

Notice to agent.—Principal bound by any notice acquired by his agent during course of agency. *Wright v. Cotten*, 140—7.

Imputing knowledge of agent to principal does not apply in question as to responsibility for criminal prosecution, dependent in part on what principal understood trade to be which agent had made. *Stanford v. Grocery Co.*, 143—420.

If agent is to buy for cash, to be furnished by principal, but he buys on credit instead, and principal receives goods knowing that he has not furnished cash with which to buy them, he is liable for their value; but not if he furnished cash, and goods were bought on credit and he used them, without knowledge of agent's default. *Swindell v. Latham*, 145—150.

Where one states to mercantile agency that he is a member of a firm, and subsequently notifies its traveling agent that his previous letter of information was sent through mistake, he is not liable for credit advanced upon strength of letter three months later. *Drewry v. McDougall*, 145—285.

Where one gave information to a

PRINCIPAL AND AGENT.

credit agency that he was a member of a certain firm, and within a reasonable time he gave agency notice that he had ceased to be a partner, he would not be liable for goods sold firm, except such as plaintiff might have sold prior to expiration of reasonable time during which agency should have notified plaintiff. *Rheinstein v. McDougall*, 149—253.

Ratification.—When agent has received money from one in payment of debt due principal, he may not repudiate agent's act and apply money as payment on debt. *Supply Co. v. Dowd*, 146—194.

One may by his words or conduct be estopped as against a third person to deny that another person is his agent, and when one of two innocent persons must sustain a loss, the law will place it upon the one whose conduct, either intentionally or negligently, misleads the other. *Metzger v. Whitehurst*, 147—177.

Where employees of railroad were retained in its employment, after injuries to a body by it, this was a ratification. *Kyles v. R. R.*, 147—398.

Management and entire business of a corporation may be entrusted to its president either by express resolution of directors or by their acquiescence in course of dealing. *Watson v. Mfg. Co.*, 147—475.

Rights of third person.—Where one sells goods to purchaser without disclosing his agency, and purchaser has no knowledge that former is not owner of goods, he may, in action by principal for purchase money, set off a demand due him from such agent. *Moore v. Lbr. Co.*, 150—268.

When principal sues upon contract for price of goods sold by agent to third party, principal's rights are subject to equities of third party when he had no knowledge at time that he was dealing with an agent, or of such facts as would put him upon inquiry. *Ibid*, 150—269.

Scope of employment.—Principal

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is liable where agent acts within scope of apparent authority, if liability would attach to principal if he were in place of agent. *Nicholson v. Dover*, 145—21.

Agent can only contract for principal within limit of his authority, and persons dealing with agent having limited powers must generally inquire as to extent of authority. *Swindell v. Latham*, 145—148.

When authority to buy or sell is given in general terms, in absence of contrary restriction, agent may buy or sell for cash or credit. *Ibid*, 145—149.

One having one restricted authority, can not exceed the limit of his power in contracting. *Metal Co. v. R. R.*, 145—297.

Powers of an attorney are to be determined, in a large measure, from purpose of his employment; he has an implied authority to do anything incidental to discharge of purpose for which he was retained, but beyond this his power ceases. *Supply Co. v. Machin* 150—744.

"Kiting" of checks from one bank to another will not be implied as being within scope of authority of general State agent of life insurance company; if bank knew, or should have known, such to be the case, then there was no liability upon part of defendant. *Bank v. Ins. Co.*, 150—774.

In action by bank to recover upon one of a series of "kiting" checks alleged to have been made by cashier under authority of her company, and to have been acquired by plaintiff for value, burden of proof is on plaintiff to show cashier had authority alleged. *Ibid*, 150—775.

Where agent is authorized to sell goods, but not collect the price, if buyer knows this and pays agent, who defaults, he is still liable to principal for amount paid. *Fidelity Co. v. Grocery Co.*, 147—514.

PRINCIPAL AND SURETY.

Contract of surety and guaranty distinguished. *Pritchard v. Mitchell*, 139—54.

PRINCIPAL AND SURETY.

Facts not sufficient to constitute guaranty. *Hughes v. Warehouse Co.*, 139—158.

Where contractor failed to complete plaintiff's house according to contract, when surety to contract not liable. *Donlan v. Trust Co.*, 139—212.

Plaintiff not entitled to attorney's fees in suit against surety to building contract. *Ibid*, 139—212.

Where insolvent co-surety executes note and mortgage for his pro rata part of principal's debt, and note and interest measure of recovery, though note given for less than true pro rata. *Chadbourn v. Durham*, 140—502.

Surety on note not discharged from liability because he was not given notice of dishonor. *Rouse v. Wooten*, 140—557.

Where defendant, in execution against the person, was not originally liable to arrest and had been discharged upon habeas corpus, he can not be held upon surrender by his sureties. *Ledford v. Emerson*, 143—527.

When married woman executed her note, secured by mortgage on her separate property, and such note was used as collateral by payee, original note is not discharged by renewals of notes given by payee. *Fitts v. Grocery Co.*, 144—463.

To constitute one a co-surety with one who signed note as maker, there must have been a mutual understanding between parties to that effect. *Bank v. Burch*, 145—318.

Recovery against surety can not exceed penal amount of bond. *Bernhardt v. Dutton*, 146—209.

Judgment against one co-principal proper where jury found note was valid debt of his, but fraudulent as to other principal. *Booker v. Eller*, 150—556.

If a surety, against whom and his principal a judgment has been rendered, and which he has paid, intends to keep it in force, he must have it assigned to a stranger for his benefit, and not canceled. *Bank v. Hotel Co.*, 147—598.

PRINCIPAL AND SURETY.

Revisal, 2842, authorizing issue of execution against principal when surety produces receipt for payment made by him, is constitutional. *Ibid*, 147—599.

Revisal, 2842, giving surety right to have execution against principal, is to be strictly construed. *Ibid*, 147—599.

Revisal, 2842, giving surety right to have execution against principal, requires at least a ten days notice, and requisites for notice stated. *Ibid*, 147—601.

Extension of time.—Agreement in note of married woman, as surety, to waive extension of time to principal, is valid and enforceable in action to foreclose mortgage securing note. *Fitts v. Grocery Co.*, 144—463.

Printing.

See Appeal, rules of supreme court.

Priorities.

See Liens; Mortgages; Judgment; Execution; Receivers, appointment of.

PRIVATE EXAMINATION.

No privy examination taken, when an estoppel. *Weeks v. Wilkins*, 139—215.

See also Deeds, probate.

When necessary.—Lease for five years without privy examination of wife, is void as to her. *Richardson v. Richardson*, 150—554.

See Deeds, probate.

PRIVIES.

Estoppel works upon estate which deed purports to convey and binds after acquired title between parties and privies. *Weeks v. Wilkins*, 139—215.

PRIVITY OF ESTATE.

To create privity of estate, must have existed between different dis-sol-zors some such relation as ancestor and heir, etc. *Jennings v. White*, 139—22.

In cases of privity of estate, title passes by devise, descent or deed. *Ibid*, 139—27.

PROCEDURE.

PRIVILEGED STATEMENTS.

Any statement or communication is conditionally privileged when made bona fide about something in which (1) the speaker has an interest or duty; (2) the hearer has a corresponding interest or duty; and (3) when the statement or communication is made in protection of that interest or in performance of that duty. *Gattis v. Kilgo*, 140—106.

If one exceeds the privilege, its protection to him ceases and the ordinary rules of liability apply. *Ibid*, 140—106.

Proceedings before school boards, religious, fraternal and like organizations, are within the class having only a qualified privilege and are protected by such privilege when it is properly used and not abused. *Ibid*, 140—106.

Absolute privilege is generally confined to judicial and legislative proceedings and official communications of a public nature, where the interest of the public is directly concerned. *Ibid*, 140—106.

See also Libel and Slander.

Probable Cause.

See Libel and Slander; Malicious Prosecution, probable cause.

Probate.

See Wills; Deeds, probate.

PROCEDURE.

Generally.—When defendant, under Revisal, sec. 1905, is claiming to lay an entry, and asks a grant for land admitted to be the same as contained in plaintiffs' grant, plaintiffs entering their protest that land lay in one county, and defendant contending that it should be dismissed for that it lay in a different county, this fact can be tried by a jury in the pending action and it is not necessary to resort to ejectment after defendant has perfected his grant. *Ullery v. Guthrie*, 148—421.

PROCESS.

PROCESS.

Abuse of.—Abuse of process, proper instruction. *Jackson v. Tel. Co.*, 139—347.

Action for, lies when. *Ibid*, 139—347.

In action for malicious abuse of process by attachment of plaintiff's cars, measure of damages is interest upon value of cars increased or diminished by deterioration of cars in daily use. *R. R. v. Hardware Co.*, 143—54.

Where facts are laid out before defendant's counsel and attachment sued out under his advice, evidence sufficient to rebut malice. *Ibid*, 143—55.

Plaintiff in attachment suit not liable because officer levied on excessive quantity of property, unless he advised, directed or encouraged such action. *Ibid*, 143—55.

Plaintiff must show an ulterior purpose, and an act in the use of process not proper in regular prosecution of proceeding. *Ibid*, 143—55.

See *Stanford v. Grocery Co.*, 143—419.

Malicious prosecution and abuse of process distinguished. *R. R. v. Hardware Co.*, 143—55.

Return of.—Sheriff's return showing service of process is prima facie sufficient till it is made to appear in some proper way that in fact there was no proper service. *Marler Co. v. Clothing Co.*, 150—521.

Service.—Service of notice in superior court by constable, insufficient. *Brown v. Myers*, 150—444.

See *Summons*.

PROCESSIONING.

Generally.—In processioning proceeding, what course and distance governs. *Hill v. Dalton*, 140—9.

Lines of senior grant, the controlling object, can not be established by lines of junior grant. *Ibid*, 140—9.

Title not in issue in processioning proceeding. *Ibid*, 140—9.

Where defendant raised no issue of title, he is estopped by that judgment to deny boundary thus determined. *Davis v. Wall*, 142—450.

PRODUCTION OF PAPERS.

Processioning proceeding should be transferred to civil issue docket when defendant denies plaintiff's title and pleads statute of limitations. *Woody v. Fountain*, 143—66.

Processioning proceeding distinguished from action to quiet title. *Ibid*, 143—67.

When petition and answer show that controversy is real and parties are in possession of lands, claiming them as their own, concerning which boundary line is in dispute, error to dismiss proceeding for want of sufficient allegation in petition and to try case as action of ejectment merely, though title to land incidentally involved. *Green v. Williams*, 144—60.

Map made by surveyor to support petitioner's contention as to true line, and evidence corroborating it, should be submitted to jury. *Ibid*, 144—60.

Burden is upon petitioner to establish his contention as to true boundary line. *Ibid*, 144—60.

See *Woody v. Fountain*, 143—71.

Appeal from clerk carries entire case to superior court, and it was proper to permit others who had acquired interests in the land to answer, so that it might finally be disposed of. *Batts v. Pridgen*, 147—135.

Consent order of survey and filing of report of surveyor in clerk's office, becomes part of record and court can not set aside or modify same except for fraud or mistake of both parties. *Rogers v. Sluder*, 148—46.

PRODUCTION OF PAPERS.

Upon order to produce papers before clerk, respondent not required to deposit papers in clerk's office. *Mills v. Lbr. Co.*, 139—524.

Court may order production of paper in control or possession of adverse party which contains evidence pertinent to the issue. *Whitten v. Tel. Co.*, 141—361.

Notice to produce papers generally insufficient where served upon one living in another town, after he has left to attend court, or

PRODUCTION OF PAPERS.

is actually there. *Beard v. R. R.*, 143—136.

See Parties, examination of.

Prohibition.

See Intoxicating Liquors.

Promise.

See Statute of Frauds, promise to answer for debt of another.

PROPERTY.

In custodia legis.—Where court has custody of property it will be retained to await result of action and satisfy any judgment that may be recovered, it being immaterial how the property was brought under control of court. *Lemly v. Ellis*, 143—200.

Prosecution Bond.

See In Forma Pauperis.

Protest.

See Negotiable Instruments.

Proxy.

See Corporations, proxy.

Public Administrator.

See Executors and Administrators.

PUBLIC BUILDINGS.

Statutory lien for materials furnished does not attach to public school buildings. *Hardware Co. v. Graded School*, 150—681.

Publication.

See Summons, service.

PUBLIC HEALTH.

Generally.—Revisal, 3051, prohibiting discharge of sewage into any stream from which public drinking supply is taken, without reference to distance of such discharge from point of intake, is constitutional. *Durham v. Cotton Mills*, 141—616.

Rules and regulations of sanitary committee of county with reference

PURCHASER FOR VALUE.

to compulsory vaccination, when reasonable and relevant to purpose, are a valid exercise of authority. *Morgan v. Stewart*, 144—424.

Removal of.—Power to remove a corporate officer from his office for reasonable and just cause is one of common law incidents of all corporations. He should be given notice and opportunity to be heard, and when motion is allowable only for cause, soundness of cause is reviewable upon quo warranto. *Burke v. Jenkins*, 148—27.

PUBLIC POLICY.

Law does not permit persons to act as officers of corporation, make contracts, etc., and avoid all responsibility by denying existence of corporation. *Perry v. Ins. Assn.*, 139—374.

Agreement made in good faith to compromise and settle disputed matters is valid and will be sustained upon highest consideration of public policy. *York v. Westall*, 143—276.

PUBLIC SCHOOLS.

Revisal, 4112, providing for levy of extra tax, above that collected by State for school purposes, is valid, though exceeding limitation of Art. V. Any tax beyond this is void. *Collie v. Comrs.*, 145—170.

See Schools; Taxation.

Punitive Damages.

See Damages, punitive.

PURCHASER FOR VALUE.

Corporation buying almost entire assets of another corporation, paying members therefor, and not ascertaining or providing for its debts, is not an innocent purchaser for value and without notice. *McIver v. Hardware Co.*, 144—478.

Holders of property to secure pre-existing debts are purchasers for value within the meaning of our registration laws, and would hold property if deed was good. *Odom v. Clark*, 146—554.

PURE FOOD LAW.**PURE FOOD LAW.**

No action lies for seller to recover from buyer of right to use sulphur fumigating preservative, because forbidden by law, nor for buyer to recover money paid. *Smith v. Alphin*, 150—427.

Revisal, 3969, refers to foods kept for sale and does not apply to sulphur fumigating preservatives for fruits. *Ibid*, 150—428.

Qualification.

See Elections, qualified voter.

Quantum Meruit.

See Contracts, implied.

Questions for Judge or Jury.

See Judge; Jury, questions for.

Quiet Enjoyment.

See Deeds, breach of warranty; Warranty.

Quieting Title.

See Title, cloud upon.

QUO WARRANTO.

Public administrator does not hold a public office, and quo warranto does not lie. *S. v. Smith*, 145—476.

An appointment of de facto officers pursuant to law, can not be questioned collaterally, even in a quo warranto proceeding. *St. George v. Hardie*, 147—93.

Power to remove a corporate officer from his office for reasonable and just cause is one of common law incidents of all corporations. He should be given notice and opportunity to be heard, and when motion is allowable only for cause, soundness of cause is reviewable upon quo warranto. *Burke v. Jenkins*, 148—27.

RAILROADS.

Generally.—Five-year statute of limitations, Revisal, 394, applies only to railroads. *Cherry v. Canal Co.*, 140—422.

RAILROADS.

Legislature has power either directly or through commission to supervise and regulate conduct of common carriers. *Corp. Com. v. R. R.*, 139—126.

Fellow servant act must be read into contract for service with railroad made in this state. *Miller v. R. R.*, 141—45.

Contract for service entered into in this state, though injury occur in another state, has no bearing. *Ibid*, 141—45.

Code, sec. 1996, does not confer on a township the right to issue bonds to aid in construction of a railroad upon which work has not been begun. *Wittkowsky v. Comrs.*, 150—96.

Where powers conferred upon railroad in its charter are exercised in an unreasonable or negligent way and others are injured in enjoyment of their property, action lies. *Thomason v. R. R.*, 142—300.

Effect of Fellow Servant Act is to abolish, as to railroads, Fellow Servant Doctrine; and make company responsible for negligent acts of employees in course of employment. *Mabry v. R. R.*, 139—388.

Venue act of 1905 applies to all railroads, both domestic and foreign. *Propst v. R. R.*, 139—397.

Use of sidetrack by railroad as hostelry, not unreasonable. *Thomason v. R. R.*, 142—318.

Under union depot act, railroads have right to make such changes in line and route as are necessary to accomplish purpose designed and make depot available to traveling public. *Dewey v. R. R.*, 142—392.

Sanction by two-thirds of aldermen of proposed change in route of railroad in a city, only applies where it of its own volition and convenience makes change. *Ibid*, 142—392.

Logging roads held to same measure of responsibility and standard of duty as railroads. *Sawyer v. R. R.*, 145—27.

Lumber road is a "railroad" within ordinary acceptance of that term. *Stewart v. Lbr. Co.*, 146—49.

RAILROADS.

It is against the policy of law to restrain industries and such enterprises as tend to develop the country and its resources, and injunction will not lie where railroad companies, upon request of town and upon order of corporation commission, have erected a union depot and laid their tracks in obedience to the order. *Griffin v. R. R.*, 150—315.

Alighting from and boarding moving trains.—Mere announcement of name of station is no invitation to alight; but, when followed by full stop soon thereafter, is ordinarily notification that it is usual place for landing passengers. *Shaw v. R. R.*, 143—312.

Not negligence for passenger to leave his seat and go upon platform of car to get off where train had slowed down to almost a complete stop and conductor had called out, "All off." *Darden v. R. R.*, 144—1.

Where brakeman on train saw or could have seen passenger in act of alighting from slowly moving train at his destination, he signalled engineer ahead and plaintiff was injured, servant was negligent. *Ibid*, 144—1.

Employee is not negligent in boarding moving train, in sight of engineer, who opened throttle of engine and caused plaintiff to fall under car. *Daniel v. R. R.*, 145—51.

Evidence of plaintiff as to custom of defendant's servants to board moving train, as he was doing when injured, is competent, though he had only been employed by defendant a month. *Ibid*, 145—51.

Where fireman, in order to save his life, was compelled to jump from engine, evidence of speed of engine and condition of wrecked cars is competent upon question of necessity. *Davis v. R. R.*, 145—95.

Opinion of plaintiff as to rate at which train was moving when he attempted to get on, is competent. *Whitfield v. R. R.*, 147—238.

No action lies for injury to one caused by boarding a train moving ten to fifteen miles an hour. *Ibid*, 147—238.

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Duty of passenger who sees train in motion to ask for it to be stopped, and if it is not done he ought not to get off. *Owens v. R. R.*, 147—359.

Ordinarily, jumping on or off a moving car is such contributory negligence as bars recovery, but this principle does not apply where conductor, on top of rapidly moving car which has been derailed, jumps and he is killed. *Dortch v. R. R.*, 148—579.

Where brakeman stepped in center of track, between rails, to catch engine moving slowly toward him, and he fell and was killed, his contributory negligence was for jury. *Smith v. R. R.*, 147—610.

An infant of fourteen is presumed to have sufficient capacity to be sensible to danger and to have power to avoid it, and this presumption will stand till rebutted by clear proof of absence of such discretion as is usual with infants of such age, and where he jumped from rapidly moving train and was injured, he can not recover. *Baker v. R. R.*, 150—564.

Where brakeman was injured by stepping on moving engine, defendant is entitled to instruction as to its rules forbidding such an act. *Crawford v. R. R.*, 150—621.

Baggage lost or damaged.—Railroad liable for loss or damage to property, other than personal baggage of passenger, if it has knowledge. *Trouser Co. v. R. R.*, 139—382.

Railroad has no right to leave baggage on depot platform, exposed to weather for three days. *Ibid*, 139—382.

If railroad knowingly permits passenger to take articles as baggage, not properly such, with or without extra charge, liable for loss though without any fault. *Ibid*, 139—382.

Carrier of goods can only relieve himself of his common law liability as insurer for loss or damage not resulting from his negligence by a contract reasonable in its terms and founded upon valuable consideration. *Marable v. R. R.*, 142—562.

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Articles carried for sale are not baggage, whatever the articles may be. *Brick v. R. R.*, 145—205.

Carrier is not insurer of merchandise delivered to it by passenger as personal baggage, without notice of contents. *Ibid*, 145—205.

Where plaintiff was not owner of trunk and contents, and he and owner of trunk were not traveling together, user of ticket could not recover for loss of baggage of another. *Ibid*, 145—206.

There is no contract for carriage, and carrier is liable only as gratuitous bailee where goods, not personal baggage, are offered for carriage, and the fact is not made known, or, notwithstanding, are accepted for carriage. *Ibid*, 145—206.

Owner of goods may sue for loss of baggage, though he did not use the ticket, when he shows gross negligence or willful misconduct. *Ibid*, 145—206.

Cattle guards.—Duty of railroad to construct cattle guards at point of entrance and exit from enclosed lands in towns, country, stock and non-stock law territory. *Shepard v. R. R.*, 140—391.

Calling stations.—When a station is called and train is stopped before it reaches regular place for receiving and discharging passengers, conductor or other employee should give such notice to passengers on inside of cars, and under some circumstances to persons standing or riding on the platform. *Wagner v. R. R.*, 147—321.

See Railroads, alighting.

Collision and derailment.—Where there is a collision or derailment, negligence presumed. *Hemphill v. Lbr. Co.*, 141—488.

See *Stewart v. R. R.*, 141—254.

In action for damages for collision, plaintiff must show that engineer's not stopping train sooner was proximate cause of injury. *Kearns v. R. R.*, 139—470.

When conductor on street car was required to take switch and he knew that on account of heavy sleet car was frequently not lighted,

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and if jury find that under existing conditions care for safety of passengers required him to remain at switch till other car passed, this would be actionable negligence if collision occurred. *Briggs v. Traction Co.*, 147—394.

In action for damages in State court for collision of two vessels, rules of admiralty courts in such cases do not apply. *Smith v. R. R.*, 145—101.

Proof of injuries received in collision between two cars moving in opposite direction entitles plaintiff to go to the jury, but it does not create an irrebuttable presumption of negligence, it only shifts burden of proof to defendant, requiring it to prove, if it could, that collision was result of accident which reasonable prudence and foresight could not prevent. *Ibid*, 147—392.

Couplers.—It is negligence for manufacturing company, owning fourteen miles of railroad track, to operate its own engines and cars, and cars of others, without automatic couplers, if this proximately caused injury. *Hairston v. Leather Co.*, 143—512.

In action for injuries caused by lack of automatic couplers, when jury finds issue of negligence against defendant, defenses of assumption of risk and contributory negligence are closed as to it, unless negligent conduct of employees amounts to recklessness. *Ibid*, 143—512.

Where jury found that plaintiff was injured by negligence of defendant in failing to have its cars equipped with automatic couplers, only defense open to defendant, in absence of evidence of recklessness, was whether plaintiff was injured in course of employment. *Ibid*, 143—512.

After adoption of automatic couplers, dead bumpers were unnecessary and dangerous; hence their retention is a defective appliance and a continuing negligence. *Dermid v. R. R.*, 148—193.

Crossings.—When engineer ap-

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proaching crossing failed to give signals, instruction that relieved traveler of duty to look and listen, erroneous. *Cooper v. R. R.*, 140—209.

Generally, omission to give ordinary or statutory signals will not relieve traveler of looking and listening before crossing track. *Ibid*, 140—209.

Charge that use of highways and streets by traveling public belong as much to public as track does to railroad company, etc., commented upon. *Edwards v. R. R.*, 140—49.

Duty of engineer on backing engine over crossing at night to sound adequate warning and keep man with light at front of engine. *Reid v. R. R.*, 140—146.

One directed by employee to try another street crossing and while there was run over by backing engine at night, she was no trespasser. *Ibid*, 140—147.

Mutual duty of railroad and traveler to keep careful lookout for danger at public crossing. *Cooper v. R. R.*, 140—209.

See *Sherrill v. R. R.*, 140—252; *Morrow v. R. R.*, 146—17.

Traveler's duty when crossing obstructed track, stated. *Cooper v. R. R.*, 140—209.

Traveler relieved of duty to look and listen in crossing track where gates are open or watchman signals him to cross. *Ibid*, 140—209.

One who attempts to cross unmolested track without first looking, guilty of contributory negligence. *Ibid*, 140—209.

Where intestate drove in covered wagon on crossing without stop and track could be seen up and down for five hundred feet, sufficient for issue of contributory negligence. *Ibid*, 140—209.

In some instances duty to look and listen when entering upon public railroad crossing may be altogether removed. *Sherrill v. R. R.*, 140—252.

Duty to look and listen applies with peculiar force to those whose duties, by contract, call them to

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work upon tracks or frequently to cross them. *Ibid*, 140—252.

Duty of one dangerously near track to look and listen, may be so qualified by facts as to require question of contributory negligence submitted to jury. *Ray v. R. R.*, 141—84.

Duty of one walking along or crossing street car track to keep a lookout and turn off when signalled. *Davis v. Traction Co.*, 141—134.

It is negligence to permit car to be "cut loose" and roll uncontrolled across much used crossing. *Wilson v. R. R.*, 142—333.

In action for injuries received at railroad crossing, plaintiff knew flagman was kept there to warn pedestrians, and getting near crossing he looked for watchman and saw none, this does not absolve him from duty to look and listen. *Hodgin v. R. R.*, 143—94.

When traveler discovers that watchman, placed at railroad crossing to give warning, is absent, he should then look and listen for passing trains. *Ibid*, 143—94.

Decree of superior court enjoining defendant from enlarging freight depot, upon jury's finding that enlargement would constitute public nuisance, will be modified to permit defendant to remedy and guard against any possible danger in crossing tracks by erecting gates and providing a gateman. *Hickory v. R. R.*, 143—451.

Error in trial court to sustain demurrer to complaint alleging that defendant unlawfully obstructed a public crossing with a freight train, which was proximate cause of injury to plaintiff when his horse was running beyond his control, though mere obstruction at time did not constitute negligence. *Duffy v. R. R.*, 144—26.

Duty of railroad when it is working on track to leave crossing for neighborhood road in safe condition for travel. *Goforth v. R. R.*, 144—570.

Statute requiring railroads to change their grades at their ex-

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pense, so as to pass over or under all crossings, is constitutional. *Ibid.*, 144—571.

Measure of duty to avoid injury imposed upon engineer in passing a public crossing, is that he must anticipate that persons will be using it, and lower his speed so that he may have his engine under such control that he can stop before coming in contact with a person on the crossing. *Smith v. R. R.*, 145—104.

Where one goes upon a much frequented crossing, with his view obstructed, and is struck by backing engine, running at greater speed than allowed by city ordinance, and without warning, he may recover. *Inman v. R. R.*, 149—126.

When one has waited at public crossing for freight train to pass, is struck by passenger train, which was not heard or seen for the noise, smoke and fog, contributory negligence is for jury. *Morrow v. R. R.*, 146—14.

Where custom of employees for ten years had been to cross tracks, go under and over cars when crossing was blocked, it was defendant's duty to provide subway, overhead bridge, or guards. *Beck v. R. R.*, 146—456.

Delayed shipments and refusal to receive.—Where freight is received for storage, held twelve days and no bill of lading is issued because agent does not know rate, constitutes "refusal to receive for transportation." *Twitty v. R. R.*, 141—355.

The statute imposing penalty upon railroad for omitting to transport goods, does not include the delivery thereof. *Alexander v. R. R.*, 144—93.

Statute imposing a penalty must be strictly construed in accordance with meaning of words employed, and must not be extended by implication or construction when act complained of does not fall clearly within spirit and letter thereof. *Ibid.*, 144—93.

Penalty statute requiring shipments to be made within reasonable

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time, is declaratory of common law and excludes no defense as to delay in transportation that could be properly made thereunder, burden being upon defendant to show reasonableness of delays beyond ordinary time prescribed. *Stone v. R. R.*, 144—220.

Statute fixing time limit within which transportation of goods, etc., shall be *prima facie* reasonable, etc., changes rule of evidence alone, and penalty is solely to enforce common law and admitted duty, and is within legislative authority. *Ibid.*, 144—220.

When goods are delivered to carrier for transportation, and bill of lading issued, the title, in absence of any direction or agreement to contrary, vests in consignee, who is alone entitled to sue as "party aggrieved," for penalty. *Ibid.*, 144—220.

A railroad owes it as a common law duty to deliver freight upon tender of lawful charges by consignee, and in absence of conflicting regulation by congress, Revisal, sec. 2633, is constitutional. *Harrill v. R. R.*, 144—532.

In action to recover penalty for refusal to deliver interstate shipment, upon tender of charges by consignee, it is no defense that agent did not know correct amount of charges because of defendant's failure to file schedule of rates, under interstate commerce act, or that bill of lading showing charges did not accompany shipment. *Ibid.*, 144—532.

Among connecting lines of common carriers the one in whose hands the goods are found damaged is presumed to have caused the damage, and burden is on it to rebut the presumption. *Furn. Co. v. Express Co.*, 144—639.

Action for penalty can be brought against foreign defendant before magistrate in any county in which it does business or has property, or where plaintiff resides. *Allen v. R. R.*, 145—37.

See *McCullen v. R. R.*, 146—569.

Taking freight out of one car and

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placing in another, at point between initial and receiving points, on same line of road, is not an intermediate point. *Davis v. R. R.*, 145—210.

Sunday is to be counted in reckoning time for shipment, when it is not the last day, though freight trains are forbade to run on that day. *Ibid*, 145—211.

See *Watson v. R. R.*, 145—241.

"Forty-eight hours at intermediate point" is *prima facie*, reasonable time only, and is not to be allowed unless it was necessary. *Ibid*, 145—214.

Responsibility is presumed against carrier who has goods after delay in shipment occurred. *Watson v. R. R.*, 145—239.

Twenty-one days to transport freight 58 miles in this State, with one terminal point, unreasonable. *Ibid*, 145—236.

Where destination of shipment is but 25 miles, on main line of road, jury may determine what is ordinary time for shipment from their common experience. *Ibid*, 146—157.

Not necessary that carrier knew who was "party aggrieved" at time of shipment, in action for penalty for delayed shipment. *Ibid*, 146—158.

Penalty statute for delayed shipment of freight, is constitutional. *Ibid*, 146—158.

Where shipment was delivered by defendant to consignee in damaged condition, and demand for lost goods being refused, penalty for failure to settle claim attaches as matter of law. *Morris v. Express Co.*, 146—170.

Revisal 2634, giving penalty for failure to settle claim for damaged shipment, is constitutional, and in absence of congressional legislation to the contrary, is a proper subject of State regulation. *Ibid*, 146—171.

In action for penalty for delayed shipment, "ordinary time" is the usual, regular, customary time within which, by the means and facilities in general use for the per-

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formance of this duty, the service should be completed. *Jenkins v. R. R.*, 146—179.

In action for penalty for delayed shipment, plaintiff must show that more than "ordinary time required," in addition to "lay days" was consumed, from which jury may find that issue. *Ibid*, 146—179.

In action for penalty for delayed shipment, there being no evidence as to "ordinary time required," the jury may say from their common knowledge and experience whether 35 days to ship less than 200 miles was reasonable time. *Ibid*, 146—180.

See *Alexander v. R. R.*, 144—93; *Stone v. R. R.*, 144—220; *Marble Co., v. Ry. Co.*, 147—55.

Issues in action for penalty for delayed shipment should be:

1. Was freight transported and delivered within a reasonable time?
2. In what sum is defendant indebted to plaintiff. *Hamrick v. R. R.*, 146—186.

See also: *Davis v. R. R.*, 147—70.

Revisal 2632, allowing penalty on delayed shipment does not apply to interstate traffic. *Ice Co. v. R. R.*, 147—62.

Penalty for delayed shipment only applies to intrastate traffic. *Ice Co. v. R. R.*, 147—62.

Penalty for failure to transport freight in reasonable time does not apply where initial and terminal points are in this State, but shipment necessarily passes through another State in transit. *Ibid*, 147—67.

In action on delayed shipment, jury should find whether there has been a delay; if so, how long, and what plaintiff is entitled to receive for it. *Davis v. R. R.*, 147—72.

Oral claim of penalty under Rev. 2634 is not sufficient "filing of claim." *Thompson v. Express Co.*, 147—346.

Penalty for delayed shipment does not cease upon arrival of car in freight yard, but only when it is unloaded, placed in warehouse and consignee notified of its delivery. *Wall v. R. R.*, 147—411.

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In action for penalty for delayed intrastate shipment, transfer from one of defendant's lines to another of its lines, through a general distributing point, free time should be allowed as for intermediate point. *Wall v. R. R.*, 147—410.

In action for penalty, jury should allow ordinary average running time of freight trains for that distance in addition to free time. *Ibid.*, 147—410.

In action for penalty for failure to settle claim for lost shipment, competent for plaintiff to testify that he had filed his claim and it had been paid. *Rabon v. R. R.*, 149—60.

In action for penalty for damage to shipment, penalty lies only where just amount claimed is recovered, and may be sued for in different actions from one for loss. *Ibid.*, 149—61.

Damages for wrongful delay in shipment of goods having market value and usually supposed to be in contemplation, is the difference in value of goods at time when they should have been and were delivered. *Development Co. v. R. R.*, 147—508.

In some cases value of user of goods may be recovered if they are in condition to use, and in absence of appreciable loss, from either source, interest on money invested in goods for time wrongful delay would be correct measure of compensation. *Ibid.*, 147—508.

In action for damage to goods caused by delayed shipment, if plaintiff seeks to recover other and additional damages by reason of special facts, knowledge of same must be brought home to other party. *Ibid.*, 147—508.

In shipments of less than car load lots, where goods are transferred from one car to another at junction point, it is an intermediate point. *Agency v. R. R.*, 147—593.

In action for damage to car load shipment of fruit, it was duty of defendant to transport with due diligence and in good condition except

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such damage as might naturally be incident to such freight, and to furnish suitable cars for shipment of particular commodity undertaken to be conveyed. *Forrester v. R. R.*, 147—554.

When freight has been transported within a reasonable time and it arrives at destination on Sunday, delivery on next day is compliance with law. *Agency v. R. R.*, 147—593.

Where goods are ordered for special purpose or present use in given way, and these facts are known to carrier, he is responsible for damages fairly attributable to delay. *Furn. Co. v. Express Co.*, 148—90.

Shipment of heavy shaft by express indicates that it was designed for present use in a mill and that some injury would result from delay in transit. *Ibid.*, 148—97.

In action for failure to promptly ship iron, causing factory to stop, in absence of evidence as to use of iron, measure of damages stated here, improper. *Mfg. Co. v. R. R.*, 149—264.

Action for penalty for delay, and value of goods lost, may be joined in same complaint. *Robertson v. R. R.*, 148—324.

When goods were "burned, stolen or destroyed," relieves carrier of penalty for failure to deliver, but burden of this defense is upon carrier. Mere proof of loss presumes negligence but does not presume that they were "burned, stolen or destroyed," so as to relieve carrier of this proof. *Ibid.*, 148—325.

Where defendant, in former action for value of goods, admitted goods were lost while in its possession, judgment was rendered for plaintiff and it was paid, and in this action to recover penalty for failure to settle former claim for loss in 60 days, it may not now set up defense that goods were in fact never received by it. *Southerland v. R. R.*, 148—445.

Where suit for value of lost shipment is compromised, action for penalty for failure to settle may be

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brought afterwards, or both causes may be joined in the same complaint. *Albritton v. R. R.*, 148—487.

In action for value of damaged shipment, and penalty, it is necessary to establish right to full amount of claim as condition precedent to right to recover penalty. *Ibid.*, 148—488.

Action for penalty for delayed shipment is given to "party aggrieved," and need not be brought "on relation of State." *Robertson v. R. R.*, 148—326.

In action for penalty for delayed shipment, it was represented to defendant that goods had been loaded in its car, for which it issued a bill of lading, whereas in fact the goods were not loaded, carrier is not bound by bill of lading and burden is upon plaintiff to prove car was loaded according to bill. *Peele v. R. R.*, 149—393.

Action for penalty under Rev. 2631, is for person who is interested in having goods shipped, and agent or attorney for attaching creditor and surety on bond has no such right. *McRackan v. R. R.*, 150—332.

Where freight was carried to depot for shipment, but not taken out of wagon and tendered defendant, because train upon which it was to be loaded was made up and ready to leave, freight was carried back home and sent to depot next morning, when it was shipped, this did not constitute a refusal to receive. *Cox v. R. R.*, 148—458.

Revisal 2631, providing penalty for refusal to receive freight is valid, though the destination of shipment is a point in another State. *Reid v. R. R.*, 149—445.

Permitting freight to be placed upon cars at station, and refusal to receive it for shipment or to issue a bill of lading for it, constitutes a refusal to receive. *Garrison v. R. R.*, 150—583.

Where consignee had refused to receive and unload car, thereby causing defendant's yards and tracks to be congested, this was no

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reason for refusing to receive a shipment to him from another place. *Ibid.*, 150—584.

Railroad company has no right to issue an embargo upon one or more of its patrons and refuse to carry or receive any freight from him, and it is indictable to unjustly discriminate between members of the public. *Ibid.*, 150—584.

While carrier is required to receive and transport freight, its patrons have no right by refusing or failing to receive freight to so monopolize the car tracks, etc., as to prevent or interfere with it in the discharge of its duty to the public. *Ibid.*, 150—585.

When freight has been placed in car and shipment has been refused, no new tender from day to day is necessary. *Ibid.*, 150—587.

Penalty for refusal to receive freight lies where shipment was intrastate, but carrier as such was engaged in interstate commerce. *Ibid.*, 150—592.

Mere placing of freight on platform and asking agent when he could ship it does not amount to a tender of the shipment, a refusal of which would incur penalty. If a daily tender and refusal was insisted upon, it should have been made clear to defendant's agent that the tender was kept good. *Cotton Mills v. R. R.*, 150—610.

It is no legal excuse for failure to receive freight that a connecting carrier had ordered an embargo. Initial carrier should have carried freight and delivered it to next carrier. *Cotton Mills v. R. R.*, 150—614.

Congested condition of freight yards in two cities would not justify an embargo on its own and connecting lines upon a manufacturing plant for 72 days. *Ibid.*, 150—615.

Carrier may show, in action for penalty for refusal to receive shipment, any legal defense or excuse. *Hardware Co. v. R. R.*, 150—706.

Carrier exercising his calling within a particular State is answerable according to the laws of the

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State for acts of nonfeasance or misfeasance committed within its limits, and it is liable for penalty for refusal to receive an interstate shipment. *Reid v. R. R.*, 150—762.

Revisal 2631 is a valid enactment. *Ibid*, 150—757.

To recover penalty for failure of carrier to receive freight, not necessary that pecuniary injury be suffered. *Ibid*, 150—765.

Where plaintiff tendered for shipment and offered to pre-pay freight, and shipment was refused because agent did not know rate, and plaintiff requested agent "when he got ready to ship to phone them and they would come over and pay freight due," penalty allowed, as this had effect of a new tender and refusal each day. *Ibid*, 150—755.

One who ships his goods to be sold for his benefit by consignee, is proper party to suit for penalty for delay. *Rollins v. R. R.*, 146—153.

See *Davis v. R. R.*, 147—69; *Cardwell v. R. R.*, 146—220; *Mfg. Co. v. R. R.*, 149—262; *Robertson v. R. R.*, 148—324; *Reid v. R. R.*, 149—425.

An express company guarantees the promptest possible delivery, and is liable for any deterioration in value of the goods caused by failure to fill that contract. *Lambert v. Express Co.*, 146—323.

Express company is liable for value of goods at date of shipment, though it did not know contents of package, where goods have suffered no physical injury, but have lost their value because of delayed shipment. *Ibid*, 146—322.

Equipment.—Evidence of an expert in the equipment of trains that a light engine should not be sent out without a conductor, competent. *Stewart v. R. R.*, 141—254.

Duty of railroad to establish such telegraph stations along line as are necessary for proper running of trains. *Ibid*, 141—255.

"Block system" required where it is a safer system and in general use upon railroads of the United States of like character in construc-

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tion and amount of traffic. *Ibid*, 141—255.

Spur tracks not required to be kept up to same standard of excellence as main line, but sidings and spurs should be kept in reasonably safe condition for traffic done over them. *Dortch v. R. R.*, 148—578.

When damages complained of were not caused by failure to equip trains with automatic couplers or the latest and most approved devices, the principles of law enunciated in *Greenlee and Troxler* cases do not apply. *Dermid v. R. R.*, 148—184.

After adoption of automatic couplers, dead bumpers were unnecessary and dangerous; hence their retention is a defective appliance and continuing negligence. *Ibid*, 148—193.

Failure to stop at station.—If conductor maliciously or wantonly carried plaintiff by her station, punitive damages proper. *Hutchinson v. R. R.*, 140—123.

Where one with a ticket boards a train which she does not know will not stop at her destination, and nothing to contrary on face of ticket, duty of defendant to stop train at her destination. *Ibid*, 140—123.

Regulation that certain trains shall not stop at all stations, reasonable if enough to serve local travel. *Ibid*, 140—123.

Defendant is liable for punitive, in addition to compensatory damages, when engineer willfully refuses to stop train at flag station, where it should have been stopped under circumstances. *Williams v. R. R.*, 144—499.

Measure of damages stated in action for negligent failure to carry one on train. *Ibid*, 144—499.

Carrier of passengers who advertises schedule of its trains to stop at certain stations for receiving and discharging passengers, is required by law to stop at such stations. *Owens v. R. R.*, 147—360.

Fires.—In action for negligent burning, evidence that plaintiff had

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a contract to deliver certain crates at fixed profit, that he had on hand material to complete contract, and since fire impossible to replace it, competent upon issue of damages. *Johnson v. Ry. Co.*, 140—574.

Property alleged to have been burned by emission of sparks from engine, competent to show that same engine shortly before or after the fire emitted sparks. *Ibid*, 140—581.

That engine had car of burning hulls day after burning of plaintiff's factory, irrelevant as tending to prove fact in issue. *Ibid*, 140—581.

If fire escapes from engine in proper condition, having proper spark arrester, carefully operated by competent engineer, and fire catches off right of way, defendant not liable. *Williams v. R. R.*, 140—623.

Evidence that right of way was foul and discovered to be on fire thirty minutes after train passed, sufficient for jury. *Ibid*, 140—623.

Fire catching on foul right of way is negligence and plaintiff may show that fire caused by live coal from fire-box, though complaint says spark came from smoke-stack. *Knott v. R. R.*, 142—241.

Immaterial to inquire how spark happened to fall from engine, so that it lighted on right of way, in bad condition, and caused fire. *Ibid*, 142—243.

In action for negligent burning, evidence that sparks flowed from engine every night between Feb 15th and April 15th and fired right of way, competent. *Ibid*, 142—243.

In action for negligent burning, nonsuit proper when evidence is that fire caught at very clean place on right of way, little dry grass there, and extraordinary drought at time. *McCoy v. R. R.*, 142—383.

Railroad not liable for burning plaintiff's hotel by fire originating off its right of way, catching lumber piled on right of way and thence to hotel. *Bowers v. R. R.*, 144—686.

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Railroad liable for sparks set out from defective engine, or defective spark-arrester, or operated in careless manner, whether fire originates on or off right of way. *Lumber Co. v. R. R.*, 143—324.

When engine properly operated, not defective, has proper spark-arrester, but fire originates on right of way because in foul or neglected condition, company liable. *Ibid*, 143—324.

See *Williams v. R. R.*, 140—623; *Thornton v. R. R.*, 150—691.

In action for burning, if fire was set by engine burden is on defendant to show that it was equipped with proper spark-arrester. *Ibid*, 143—324.

When property is lost or destroyed by negligence of another, usual rule as to measure of damages is reasonable worth of property at time and place of its destruction. *Hart v. R. R.*, 144—92.

In action for negligent burning, testimony that immediately after southbound train passed, witness saw smoke in his own woods, is sufficiently definite to identify train which caused fire, where witness saw smoke rising from plaintiff's premises just before he saw smoke in his woods. *Whitehurst v. R. R.*, 146—591.

In action for negligent burning, it is competent to prove that same train had set fire to woods adjoining those of plaintiff, or near thereto, on the day before. *Ibid*, 146—591.

Evidence showing at what distance from right of way cinders from other engines had been emitted, is competent to contradict experts who offered to show that cinders would not have fallen so far from the track. *Ibid*, 146—591.

Motion to nonsuit properly denied, where evidence showed that cinders emitted from defendant's engine caused the fire and the spark arrester was in bad condition. *Ibid*, 146—592.

In action for burning over land, it is competent to ask plaintiff if some one else owned timber burned. *Gay v. R. R.*, 148—341.

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In action for negligent burning, testimony that "the whistle he knew as Capt. Taylor's" together with other evidence, sufficient for jury as to identity of the defective engine. *Whitehurst v. R. R.*, 146—530.

Evidence that sparks were emitted from engine and they set fire to timber, makes a prima facie case for plaintiff, but only to extent of being evidence sufficient to carry case to jury and warrant a verdict for plaintiff, if jury should find ultimate or crucial fact that fire was caused by defendant's negligence. *Cox v. R. R.*, 149—118.

Where plaintiff had actual possession of land burned and claimed it as her own, the alleged defective links in her paper title would not necessarily bar recovery. *Thorn-ton v. R. R.*, 150—692.

Tax list, showing assessed valuation of land, is incompetent in action for burning timber. *Hamilton v. R. R.*, 150—193.

When evidence is conflicting as to amount of damages to timber caused by defendant's negligence, proper to charge that jury should not be controlled in their verdict by opinion of witness, but they should apply their own common-sense, "so far as affected by your experience." *Ibid*, 150—194.

Furnishing Cars.—Railroad not liable for penalty for failure to furnish cars within time limited in Rule 9 of Corporation Commission. *McDuffie v. R. R.*, 145—398.

Headlights.—Failure to give warning, while not negligence per se as to pedestrian using track for his own convenience, may be evidence of negligence as to him when train is run at night without headlight. *Morrow v. R. R.*, 147—626.

Engine should not be run at night without a headlight, and if it is, bell and whistle should be used to warn pedestrians who may be on the track, and not at crossings. *Ibid*, 147—625.

Testimony of casual passer that he noticed rapidly approaching train 200 yards off when he crossed

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track, and again when it was 200 yards distant, and if there was a headlight on it he could not see it, such negative testimony, standing alone, has scarcely probative force sufficient to establish any fact. *Strickland v. R. R.*, 150—7.

Injuries on tracks.—When decedent run over at night by backing engine, without lights or signals, and no one stationed to keep lookout, defendant liable. *Dixon v. R. R.*, 140—201.

Where intestate run over by train at night, while lying unconscious upon track, straight for 100 yards, properly submitted to jury. *Plemmons v. R. R.*, 140—286.

Intestate run over by backing engine, at night, instruction proper. *Reid v. R. R.*, 140—146.

In action for injuries to one working on or near track by moving train, charge upon contributory negligence proper. *Brown v. R. R.*, 144—634.

In action for personal injuries caused by failure to keep lookout, it is no defense that plaintiff was down helpless from some unusual cause. *Sawyer v. R. R.*, 145—28.

Duty of one walking on track to look and listen. *Allen v. R. R.*, 141 340.

A train backing over a track at night, which is used as a walkway, should have a light on the lead car, and where one stood on top of the car, about the middle, with a lantern in his hand, it is for jury to say whether or not this light would answer the purpose for one being on end of car. *Allen v. R. R.*, 149—259.

Engine should not be run at night without a headlight, and if it is, bell and whistle should be used to warn pedestrians who may be on the track, and not at crossing. *Morrow v. R. R.*, 147—625.

One walking on railroad track or so near thereto as to be in danger of being struck by passing train can not complain of any breach of duty which railroad does not owe him. *Ibid*, 147—626.

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Duty to give reasonable and proper warnings for protection of travelers on highway when trains are approaching, and he may assume this duty will be performed, and if injured and he has not proximately contributed thereto, by failing to look and listen, action lies. *Ibid*, 147—625.

When one goes upon railroad track, without permission or license, and is a mere trespasser, he is bound to use both senses of sight and hearing. *Beach v. R. R.*, 148—157.

If an engineer sees one on track, though he be a trespasser, and is not possessed of either senses of sight or hearing, and is therefore unable to take care of himself, he must at once adopt such measures as common prudence requires to see that he is not injured. *Ibid*, 148—158.

Engineer has right to presume, even up to last moment, when it is too late to save one on track, that he will leave track in due time, if he appears to have possession of his ordinary faculties and of sight or hearing, and is so situated that he can use them for his own safety. *Ibid*, 148—158.

If neither engineer nor fireman saw man when he was struck, there was negligence in not keeping a proper lookout, unless they were prevented from seeing by negligence of defendant in not furnishing a headlight, should the jury find there was no headlight. *Thompson v. R. R.*, 149—157.

In action for wrongful death, evidence that track within town limits was habitually used as a walkway, was competent. *Ibid*, 149—157.

Decedent in apparent possession of his faculties, was walking along cross-ties and approaching the train which killed him, and a few yards from trestle, facing a sign-board warning him to keep off of a bridge 192 feet long and 20 feet above water, and decedent knew train was due and about to enter bridge, he cannot recover. *Strickland v. R. R.*, 150—10.

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Injury to stock.—Charge, in action for injury to stock in transit, approved. *Jones v. R. R.*, 148—452.

Where shipment of stock was unloaded and placed in stable by carrier, awaiting arrival of owner, and one mule appeared to have been trampled and bruised, liability of carrier continued for reasonable time after actual transportation ceased. *Jones-Lane Co. v. R. R.*, 148—582.

Where there is proof that animal was injured while in possession of carrier, prima facie case of negligence is made out so as to require submission of matter to jury. *Ibid*, 148—583.

Kicking cars and running switches.—It is negligence to permit car to be "cut loose" and roll uncontrolled across much-used crossing. *Wilson v. R. R.*, 142—333.

Making running switch is not negligence per se, when detached moving car has brakeman on it and it is under control. *Allen v. R. R.*, 145—214.

Evidence of contributory negligence in this case for injuries in making running switch, sufficient for jury. *Ibid*, 145—218.

When bulletined rule requiring car repairers to put up blue flag was violated, to knowledge of engineer when short jobs were to be done, and he "kicked" a car at an excessive rate of speed on the track and against the car upon which plaintiff's intestate was working, it is culpable negligence. *Bordeaux v. R. R.*, 150—532.

Making flying switches on the railway tracks and sidings running across and along streets of populous towns, is per se gross negligence. *Vaden v. R. R.*, 150—702.

In action for negligent killing of boy near crossing in populous part of city, by a flying switch being made, evidence of frequent passing of school children, factory hands and citizens generally, competent, to show conditions that should have put defendant on notice as to necessity for caution in moving cars at this point. *Ibid*, 150—701.

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Liability of lessor.—Lessor responsible for actionable negligence of defendant railroad. *Mabry v. R. R.*, 139—388.

Lessee of street railway who has assigned lease and cars and at time of injury to plaintiff was not operating road, not liable for negligence of employees of assignee. *Dunn v. Ry.*, 141—521.

Lessor railroad company liable for torts of lessee. *Carleton v. R. R.*, 143—43.

See *Parker v. R. R.*, 150—434.

In action for wrongful death, complaint not demurrable because it joins lessor and lessee companies. *Ibid.*, 143—44.

Lessor railroad company is not liable for tortious acts of its lessee, done not while carrying on the business of its lessor, but while engaged in an entirely separate and distinct, though similar business of its own. *McCulloch v. R. R.*, 149—307.

Entry by lessee railroad company upon and taking locus in quo granted to lessor, and in furtherance of lessee's business, is lawful and no action lies against either. *Ibid.*, 149—308.

Lookout.—Duty of employees operating train to keep careful and continuous outlook along track, and company is liable for injuries proximately resulting from negligent performance of this duty. *Sawyer v. R. R.*, 145—27.

Persons before entering upon a railway track must look and listen for approaching trains. *Royster v. R. R.*, 147—350.

Failure to sound bell or whistle, or unusually fast running, will not render defendant liable to one who actually knows train is approaching. *Ibid.*, 147—351.

Duty to give reasonable and proper warnings for protection of travelers on highway when trains are approaching, and he may assume this duty will be performed, and if injured and he has not proximately contributed thereto, by failing to look and listen, action lies. *Morrow v. R. R.*, 147—625.

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track, without permission or license, and is a mere trespasser, he is bound to use both senses of sight and hearing. *Beach v. R. R.*, 148—157.

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Passengers.—Where plaintiff, waiting at flag station for his train, stepped into hole in platform and was injured, he was a passenger and may recover. *Pineus v. R. R.*, 140—450.

Punitive damages proper where passenger wrongfully ejected from train at night, by conductor and brakeman in rude, stern, harsh, humiliating manner. *Parrott v. R. R.*, 140—546.

Upon proof by defendant of custom of conductor in taking up tickets, testimony that this conductor had on previous occasions called on witness for ticket after its surrender to him, competent. *Parrott v. R. R.*, 140—546.

Instruction that Revisal 2628 does not apply if plaintiff entered upon platform in bona fide belief that train was not moving, and if reasonably prudent person under similar circumstances would have

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so believed and acted, was erroneous. *Shaw v. R. R.*, 143—312.

No duty of railroad to protect passenger resisting a known officer of the law in arresting him, or to adjudge the right of the officer in so doing. *Bowden v. R. R.*, 144—28.

A ticket entitling a passenger to a berth, does not mean a whole stateroom with two berths, unoccupied. *Basnight v. R. R.*, 147—170.

Where one bought a ticket from defendant's agent at Sanford, for passage of plaintiff from Kittrell to Sanford, and agent at Sanford delayed notifying agent at Kittrell to give ticket to plaintiff for six days, this was actionable negligence. *Reeves v. R. R.*, 149—247.

Carrier owes passenger duty to provide for his safe conveyance, as far as human care and foresight could go, but law does not require use of every device. *Hollingsworth v. Skelding*, 142—246.

See *Marable v. R. R.*, 142—561.

Railroads may operate certain trains for freight and if it does no one has right thereon as a passenger. *Vassor v. R. R.*, 142—68.

Contract with some authorized agent necessary before one can enter upon freight train as passenger. *Ibid*, 142—68.

See *Marable v. R. R.*, 142—557.

However negligent he (a passenger) may have been in placing himself in an improper position upon the carrier's vehicle, if his negligence did not contribute in any degree to the accident which befell him, but the accident was the result of the negligence of the carrier, he may recover. *Miller v. R. R.*, 144—553.

Passenger on mixed train, whether in passenger coach or caboose or car temporarily filled for the purpose, is entitled to highest degree of care and diligence of which such trains are susceptible. Difference in character and purposes of trains should be given due consideration in reference to proper management and control, but there is no relaxation as to degree of care required

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towards a passenger on part of company's employees. *Suttle v. R. R.*, 150—671.

Passenger on mixed train is held to degree of care commensurate with increased dangers ordinarily incident to their management; his rights should be determined in reference to such trains when carefully and properly managed, and he is not required to anticipate unusual dangers incident to company's negligence. *Ibid*, 150—673.

Duty of railroads to exercise highest degree of care, prudence and foresight for the safety of passengers in caboose which was reasonably practicable under the circumstances, and if it failed in this duty, thereby proximately causing injury, it is liable, if plaintiff was not negligent, or although plaintiff was negligent, if defendant's negligence was real cause of injury. *Miller v. R. R.*, 144—554.

Standing up, under certain circumstances, or getting up from one's seat for a natural purpose, or going for a drink of water or the like, is not negligence per se, but question should, as a rule, be referred to jury under proper charge. *Ibid*, 150—673.

When a passenger falls overboard, master and crew should make every reasonable endeavor consistent with safety of the ship and passengers to rescue their passenger after discovering his situation. *Pate v. Steamboat Co.*, 148—572.

Where plaintiff escorted her husband to station and went upon train to bid him good-bye, she was neither a passenger nor a trespasser, but was on premises by defendant's implied invitation, and it was bound to exercise ordinary care for her safety. *Fortune v. R. R.*, 150—698.

Premises.—Where plaintiff, waiting at flag station for his train, stepped into hole in platform and was injured, he was a passenger and may recover. *Pineus v. R. R.*, 140—450.

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Duty of railroad to keep safe station premises extends to all who rightfully come on legitimate business with agent, whether at flag or regular station. *Ibid*, 140—450.

Failure to have sufficient lights upon wharf, where passengers alight, when proximate cause of injury, is continuing negligence. *Ruffin v. R. R.*, 142—120.

Railroads must provide safe exits and reasonably safe platform facilities for entering and leaving cars. *Ibid*, 142—121.

Question for jury whether it is negligence for railroad to provide for passengers to leave cars upon one side of train, and not warn them of dangers on other side. *Ibid*, 142—120.

Railroad liable for injury to passenger, on his way to train, by being struck by truck rolled by newspaper porter, on principal that it has temporarily accepted him as its servant. *Mangum v. R. R.*, 145—152.

The establishment and proper use of a freight station across the street from plaintiff's property does not constitute actionable nuisance. *Taylor v. Ry.*, 145—404.

If railroad companies either for their own or for the convenience of their patrons, establish quasi-depots or stopping places, they must make them safe—provide lights at night. *Wagner v. R. R.*, 147—329.

Passenger is entitled not only to be properly carried, but he must be carried to end of journey for which he has contracted to be carried, and must be put down at usual place of stopping, and where train is stopped 50 yards east of regular stopping place and line of cars is standing on either side of and close by plaintiff's train, and he is injured in alighting, this rule is not fulfilled. *Smith v. R. R.*, 147—450.

Refrigerator cars.—In action for damage to car load shipment of fruit, it was duty of defendant to transport with due diligence and in good condition except such damage as might naturally be incident to

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such freight, and to furnish suitable cars for shipment of particular commodity undertaken to be conveyed. *Forrester v. R. R.*, 147—554.

In action for damage to car of fruit, where ventilated car was sent, but freight was loaded by defendant's agent with knowledge of shipper, in other car, this will not relieve defendant from liability. *Ibid*, 147—555.

Relief department.—Where employee contracts with railroad, joins relief department, and is injured in South Carolina, and courts of that State have interpreted the contract as an agreement to elect in event of injury, to accept benefits and release defendant, or waive benefits and sue, his election to receive benefits released his cause of action. *Cannady v. R. R.*, 143—440.

Action does not lie in favor of member against relief department, it being an unincorporated society for relief of members of a railroad company. *Nelson v. Relief Dept.*, 147—105.

Riding on platform.—When one is injured while riding in a dangerous position upon a railroad car he is prima facie guilty of negligence which will bar recovery, and the burden is on him to show the injury was not the result of his negligence. *Wagner v. R. R.*, 147—323.

Where passenger sat on steps of car when there was plenty of room inside, and he stepped or fell off and was injured, he was negligent as matter of law. *Ibid*, 147—324.

Where passenger is injured by riding on platform, charge which omits the question of plaintiff's negligence in exposing himself to danger in first instance, is erroneous. *Ibid*, 147—327.

Correct construction of Rev. 2628, forbidding passengers to ride on platform is not clear, and while we do not hold that it is necessary for defendant to plead the statute as an affirmative defense, yet the nonliability of carrier, when it is relevant, cannot well be present-

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ed under the general issue. *Ibid*, 147—329.

When train has stopped at station and plaintiff is thrown from platform of car in alighting before she is given reasonable opportunity to safely step off, there is no contributory negligence. *Smith v. R. R.*, 147—451.

Where plaintiff escorted her husband to station and went upon platform of car with him, and finding car door locked, she stood on platform two minutes and was injured in collision which occurred there, she was not guilty of contributory negligence. *Fortune v. R. R.*, 150—698.

Right of way.—Deed to right of way gives railroad no more rights than if acquired by condemnation. *Shepard v. R. R.*, 140—391.

License granted by city to railroad to lay track upon street, in absence of express power in charter so to do, is not a permanent easement. *State v. R. R.*, 141—736.

City may make such laws controlling use of street by railroad for tracks, etc., as safety and comfort of citizens demand, where contract is merely a license. *Ibid*, 141—736.

Franchises and privileges granted by city to use streets, wharves or other public property, accepted subject to police power of city. *Ibid*, 141—736.

Railroad entitled to injunctive relief against interference with its right of way, without regard to solvency of defendants. *R. R. v. Olive*, 142—257.

Proof to be made before railroad entitled to injunction for obstructing right of way. *Ibid*, 142—257.

Where deed granting right of way prohibits entry upon burial ground, etc., but no part was so used at the time, right to use not interfered with though land appropriated to such use since. *Ibid*, 142—258.

Right of way of statutory width presumed, where deed silent. *Ibid*, 142—270.

When railroad takes land and

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builds road and owner takes no steps to have damages assessed in two years after completion, grant is presumed. *Ibid*, 142—258.

Not necessary that all of condemned right of way be used at once, and permissive use of portion does not deprive one of right to afterwards take land needed for the purpose. *Ibid*, 142—274.

Facts as to negligent construction of spur track and use of coal chute constitute actionable nuisance. *Thompson v. R. R.*, 142—300.

Railroad company owns its right of way as a necessary means of discharging its duty as common carrier to the public, and cannot dispose of it, or, by permissive user, as a pass-way, confer any rights upon the public inconsistent with the purpose for which it has been acquired. *Muse v. R. R.*, 149—445.

Where grants to railroads are indefinite, leaving exact route to be selected by the company, prior right will attach to that company which first locates the line. *Ry. v. R. R.*, 142—423.

Preliminary survey made by engineer, never reported to company or acted upon, will not prevent another company from locating on same line. *Ibid*, 142—424.

Priority of location of right of way cannot be defeated by rival company purchasing property from owners. *Ibid*, 142—424.

Charter right to condemn old road-beds does not apply to old road-bed over which another railroad has established a prior right. *Ibid*, 142—424.

Property appropriated to public use may be appropriated to another public use. But where second appropriation is inconsistent with first, power can only be exercised by reason of legislative authority given in express terms or by necessary implication. *Ibid*, 142—425.

Railroad has no right to enter on land and construct road until it acquires right by agreement with owner or by paying into court

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amount awarded by commissoiners. *Ibid*, 142—425.

See *State v. Wells*, 142—590.

In action for damages for negligent construction of drain, issues should be so framed that plaintiff recovers damage up to trial, not exceeding five years, and for permanent easement which is acquired by payment of judgment. *Parks v. R. R.*, 143—289.

Legislature has power to authorize a railroad to cross and erect a bridge over a navigable stream. *Pedrick v. R. R.*, 143—486.

Whether charter of railroad authorizes construction of bridge over navigable stream, power will not be found unless expressly given. *Ibid*, 143—486.

Draw-bridge over navigable river is not such an obstruction to navigation as to be a nuisance. It must materially interrupt general navigation to be a nuisance. *Ibid*, 143—486.

Where charter gave railroad right to construct draw-bridge over navigable river, temporary injunction denied, where evidence as to whether bridge was a nuisance if constructed above or below town, and a fourth of the work had been done before application made. *Ibid*, 143—486.

Where bridge over navigable stream is erected for public purposes, produces public benefit, and leaves reasonable space for passage of vessels, it is not indictable. Bridge must plainly appear to be a nuisance before it can be so decreed, since equity court gives defendant benefit of all reasonable doubts. *Ibid*, 143—506.

"A free and perpetual right of entry, right of way and easement," etc., for railroad purposes, conveys an easement only. *Beasley v. R. R.*, 145—272.

Improvement company not authorized to build a railroad, cannot take and use easement in right of way. Such act is *ultra vires* and at suit of State. Its charter would be forfeited. *Ibid*, 145—276.

Grants of easements to railroads

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are construed as conveying no more than may be reasonably intended within contemplation of parties. *Ibid*, 145—277.

Right of way for tramway gives no implied right to construct and operate a railroad. *Ibid*, 145—277.

Lessee railroad company can acquire from its lessor only such easement in right of way as lessor enjoyed, and where lessee has placed additional burden upon land by its use for purposes other than for which lot was used purely as lessee, plaintiff is entitled to permanent damages in nature of condemnation. *McCulloch v. R. R.*, 146—318.

Wrongful user by railroad, or its lessee, of easement for trackage or other uses alien to its rights, is not protected by any statute of limitations. *Ibid*, 146—319.

It is presumed that railroad has acquired the right of way authorized by its charter, when road was built in 1858, and it has always used 100 feet on either side of center of track, and this right of way is taxable by corporation commission. *R. R., v. Newbern*, 147—168.

As against rights of abutting owners, town has no right to grant railroad easement to lay its track and operate trains over streets of town, even though title to streets be in town. *Staton v. R. R.*, 147—435.

Injunction does not lie to restrain use of street, abutting on plaintiff's land, for railroad purposes, where plaintiff bought his land long after building of road and with knowledge of its use. Courts never enjoin construction or use of public utilities and improvements at suit of private individuals unless damage is both serious in amount and irreparable in character. *Staton v. R. R.*, 147—439.

Action for damage caused by construction, of railroad or repairs thereto accrues not necessarily when road is constructed, but when first injury was sustained. *Ibid*, 147—441.

Street cannot be converted into yard for storing or deposit or cars to injury of adjoining owners. An

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unreasonable use of street by street railway may doubtless afford right of action to property owners specially injured thereby. *Ibid*, 147—446.

If damages sought for the taking of land for railroad purposes would necessarily be included in an assessment in condemnation proceedings, owner must pursue remedy provided under charter or general law. *Beasley v. R. R.*, 147—365.

For damages incident to negligent construction of road bed, recovery may be had, though right of way has been purchased or regularly acquired by condemnation. *Davenport v. R. R.*, 148—292.

Railroad company cannot be ousted from land by ejectment, nor subjected to successive and repeated action of trespass, but remedy for wrong, if one has been committed by occupation of land, is to be redressed by an award of permanent damages. *Porter v. R. R.*, 148—565.

See *Beasley v. R. R.*, 147—364.

Where railroad company has entered upon land for its purposes, permanent damages, including recovery for the entire wrong,—past, present and prospective—should be had in one action and all parties who have any interest in land should be joined. *Ibid*, 148—566.

Before plaintiff can claim and recover compensation for right of way he must establish not a mere *prima facie* but a good title, as he would be compelled to do in a bill for specific performance. *Abernathy v. R. R.*, 150—104.

In action by owner for pay for land taken for public use, defendant may show that title is in a stranger to suit, without connecting itself therewith. *Ibid*, 150—105.

For the flooding of plaintiff's land, permanent damages against railroad may be recovered in one action, but independent contractor if liable at all for constructing road-bed according to plans furnished by railroad company's engineers, cannot be for any other damage than ac-

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crued prior to completion of work and delivery to owner. *Willis v. White*, 150—203.

Married woman may maintain action in her own name for injury to her land caused by improper construction of road-bed. *Ibid*, 150—205.

Railroad company has the right to use streets of town for railroad purposes, with assent of town commissioners. *Griffin v. R. R.*, 150—313.

Action of aldermen in authorizing railroad company to use certain streets for railroad purposes, when statutory power is given, is not reviewable by the courts at instance of adjoining land owner. *Ibid*, 150—314.

Rule.—Rule requiring train to be operated in yard under control, modified by schedule. *Haynes v. R. R.*, 143—167.

Rule requiring flagman to put torpedoes on track when train has stopped at unusual place, construed. *Meacham v. R. R.*, 149—152.

Parol evidence tending to show that conditions had arisen in a particular instance so that printed rule of employer did not apply, is not an interpretation of the rule by parol. *Ibid*, 149—153.

Scale tracks.—Evidence competent relative to placing of scale tracks. *Corporation Commission v. R. R.*, 139—127.

Car loads to be weighed, not number of shippers, test whether it is reasonable to have scale track. *Ibid*, 139—127.

Shifting without signals.—It is a negligent act to back a train into a yard, without signals, where persons are accustomed to stand. *Ray v. R. R.*, 141—84.

Continuing negligence to rapidly run train through populous settlement at night, without headlight or other proper signal. *Heavener v. R. R.*, 141—245.

Where one is struck by engine, backing over crossing, without lights, signals or other warnings,

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in thickly settled community, it is negligence, and without other evidence, contributory negligence does not arise. *Gerringer v. R. R.*, 146—32.

It is negligence to back a train without warning, signal or anything on rear of train to give notice. *Beck v. R. R.*, 146—458.

It is negligence to operate a train at night without a headlight, and evidence in action for wrongful death sufficient. *Thompson v. R. R.*, 149—157.

It is actionable negligence for engine to be backed at night against a line of 22 cars with such force as to knock them 1 1-2 car lengths and injure flagman, who was not in fault. *Meacham v. R. R.*, 149—154.

A train backing over a track at night, which is used as a walkway, should have a light on the lead car, and where one stood on top of car, about the middle, with a lantern in his hand, it is for jury to say whether or not this light would answer the purpose for one being on end of car. *Allen v. R. R.*, 149—259.

Signals.—Duty of giving warning of unusual and unexpected movement of train, to employee whose duty it is to be on cars, is manifest. *Redman v. R. R.*, 150—404.

Trespasser.—One directed by employee to try another street crossing and while there was run over by backing train at night, etc., was no trespasser. *Reid v. R. R.*, 140—147.

Trespasser attempting to perpetrate fraud by beating way on top of train may recover for violence of brakeman. *Hayes v. R. R.*, 141—195.

Trespasser upon train wrongfully ejected, entitled to recover though knocked under train by striking post. *Ibid*, 141—196.

A stranger who climbs upon engine at night is not entitled to same care that employees are, and where he is killed in a collision caused by open switch, he cannot recover in absence of evidence of willful wrong. *Bailey v. R. R.*, 149—173.

RECEIVERS.

Where plaintiff escorted her husband to station and went upon train to bid him good-bye, she was neither a passenger nor a trespasser, but was on premises by defendant's implied invitation, and it was bound to exercise ordinary care for her safety. *Fortune v. R. R.*, 150—698.

Violation of ordinances.—Injury to one caused by operation of train in violation of city ordinance, evidence of negligence. *Wilson v. R. R.*, 142—333.

See Negligence, evidence of.

Rates.

See Carriers, discriminations, freight rates; Telephone Companies' rates.

Ratification.

See Principal and Agent, ratification; Contracts, ratification.

REAL ESTATE.

Contracts for sale of standing timber is within statute of frauds. *York v. Westall*, 143—281.

See Estates; Statute of Frauds.

RECEIPTS.

Recital in deed of payment of consideration, when not conclusive. *Campbell v. Everhart*, 139—503.

Sending check "in full of account," not inclusive of amount claimed by plaintiff, which he received, endorsed and kept money, evidence sufficient to go to jury upon intent of full payment. *Armstrong v. Lonon*, 149—435.

See Evidence; Payment.

RECEIVERS.

Appointment.—Receiver for foreign insurance company will not be appointed where it has no assets other than assessments to become due. *Blackwell v. Life Assn.*, 141—117.

When there is no exception taken at time of appeal from an order of court appointing a receiver, the re-

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reivership continues in full force. *Talbot v. Tyson*, 147—274.

Compensation.—When order of court below allowing an amount to a receiver for services as such is appealed from and there is no suggestion that amount allowed the receiver for services is based upon a wrong principle or is clearly excessive, order will not be disturbed. *Talbot v. Tyson*, 147—274.

Title of.—Receiver takes whatever title debtor had and nothing more. *Mershon v. Morris*, 148—53.

RECITALS.

Recital in decree that "defendants were duly served," when owners of land subject to dower were not made parties, has no effect. *Card v. Finch*, 142—140.

Innocent purchaser will be protected where judgment regular upon its face, recites service of process. *Hatcher v. Faison*, 142—364.

See Deeds, recitals in; Judgments.

RECORDARI.

Write of recordari may be used either as a substitute for an appeal or as a writ of false judgment. Applicant must show merit in his case and that he has not been guilty of laches. *Marler Co. v. Clothing Co.*, 150—522.

See Appeal.

RECORDS.

Burnt and lost.—Contents of lost will may be proved by evidence of one witness though interested, whose veracity and competency are unimpeached. In re *Hedgepeth*, 150—249.

Clerk may take probate of lost will, or one destroyed by some other person than testator, or by testator not having animus revocandi, and bill in equity to set up will is not necessary. *Ibid*, 150—249.

See Burnt and Lost Records; Estoppel, in pais.

REFEREES.

Recoupment.

See Contracts, breach of; Counterclaim.

REFEREES AND REFERENCE.

Generally.—Plaintiff asked for an accounting, defendant submitted and averred that plaintiff owed him; in substance, this set up a counterclaim. *Boyle v. Stallings*, 140—524.

In cases of equitable nature, if account has been taken and report made, plaintiff may not suffer judgment of nonsuit. *Ibid*, 140—524.

Findings of Referee.—Findings of referee are conclusive, unless excepted to, and upon exceptions sustained by court below they are still conclusive if there is evidence to sustain them, or they are based upon improper evidence. *Harris v. Smith*, 144—439.

When there is competent evidence to sustain findings of fact by the referee, and his report is confirmed by judge, it is binding upon appeal. *Thornton v. McNeeley*, 144—622.

See *Frey v. Lumber Co.*, 144—759; *Henderson v. McLain*, 146—333; *Foy v. Gray*, 148—437.

When exceptions to report of referee and order of judge confirming it are directed to correct findings of fact upon competent evidence and to correct conclusions of law arising therefrom, judgment will be affirmed. *Watson v. Mfg. Co.*, 147—478.

When judge sustains findings of fact by referee, his ruling is conclusive, except as to those findings of fact as to which there is no evidence to support them, and that ground is set out in the exception. *Foy v. Gray*, 148—436.

Must be excepted to.—Plaintiff must except to order of reference or he loses right to jury trial upon exception to findings of referee, but he is entitled to have judge review findings, and in his discretion may submit question to jury, especially where facts depend upon doubtful

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and conflicting testimony. *Moseley v. Johnson*, 144—257.

Right to jury trial is waived unless order of reference is excepted to definitely and specifically, pointing out specific facts upon which it is demanded. *Roughton v. Sawyer*, 144—766.

When one desires to reserve his right to jury trial, it should be expressly claimed when order for compulsory reference is made. The exceptions must be definite and present distinctly each finding of fact by referee to which exception is taken. *Ogden v. Land Co.*, 146—446.

Jury trial cannot be had when no exception was noted at time to order of reference. *Bruce v. Mining Co.*, 147—644.

Should not be ordered.—Order of reference to take an account should not be made when there is a plea in bar of account which goes to the entire demand, until plea has first been considered and determined. *Duckworth v. Duckworth*, 144—621.

Plea of sole seisin by reason of twenty years adverse possession, raises an issue in bar of an account, and no order for accounting should be made till same has been determined. *Ibid.*, 144—621.

Special plea in bar should be determined before account taken. *Oldham v. Rieger*, 145—257.

Reformation.

See Contracts, reformation; Equity, reformation.

REGISTER OF DEEDS.

Office of.—Office of Register of Deeds is constitutional and legislature may change the duties and diminish the emoluments if public welfare requires. *Fortune v. Commissioners*, 140—323.

Issue of license.—In action against Register of Deeds for penalty for wrongfully issuing marriage license, "reasonable inquiry" involves inquiry made of, or information furnished by some person

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known to him to be reliable, or if unknown, identified by some reliable person. *Furr v. Johnson*, 140—157.

Failure to administer oath to one applying for marriage license, is a circumstance, with other evidence, tending to show lack of reasonable inquiry. *Laney v. Mackey*, 144—633.

Reasonable inquiry is not made where license for marriage of motherless girl, sixteen years of age, without consent of father, is issued upon application of one of bad character, and who was not known to Register. *Ibid.*, 144—634.

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Connor Act applies both to lost and other deeds executed after December 1, 1885. *Hinton v. Moore*, 139—43.

Where plaintiff purchased for value, parol evidence that his grantor deeded land in controversy to another, inadmissible. *Ibid.*, 139—43.

Deed effective under Statute of Uses, valid between parties without registration. *Ibid.*, 139—47.

Registration supplies ceremony of livery of seisin. *Ibid.*, 139—47.

If claimant loses deed before registration, may protect his title by lis pendens. *Ibid.*, 139—48.

Registration of one's grant in 1884 vested legal title in him and was constructive notice to world that he claimed land as his own. *McAden v. Palmer*, 140—258.

"Connor Act" does not extend to a claim by adverse possession. *Janney v. Robbins*, 141—400.

Where jury found that defendant's deed of trust was registered prior to plaintiff's deed, which was older in date, and he was not purchaser for value, not necessary to defeat defendant's claim that there be actual fraud on his part. *Tyner v. Barnes*, 142—110.

As against volunteers or donees, older deed, though unrecorded, will, as a rule, prevail. *Ibid.*, 142—110.

REGISTRATION.

Unregistered deed competent to show color of title. *Allen v. Burch*, 142—528.

Unregistered deed, or unregistered assignment of mortgage, is good between parties and their heirs, in absence of intervening rights of creditors or purchasers. *Morton v. Lumber Co.*, 144—31.

Registration of deed showing probate, examination of wife, order of registration and names of grantors, but omitting copy of their signatures at end of instrument, is sufficient notice to creditors. *Smith v. Lumber Co.*, 144—47.

Filing of deed by grantors with Register of Deeds for registration, sufficient notice to creditors. *Smith v. Lumber Co.*, 144—47.

Leaving deed in Register's office without paying his fees is "not a filing for registration." *Ibid*, 144—49.

Recorded option on lands given by executors having power is notice of its terms only, and time within which it should be exercised; and an unregistered waiver of time limit by executors consenting to execute deed thereafter is inoperative against purchaser for value under sufficient and subsequently registered deed; court of equity will not place cloud upon title by decreeing that executors convey title as they have, and they are not liable for refusing to convey. *Trogon v. Williams*, 144—193.

Note under seal, reciting that it is for balance of purchase price of land, and registered, does not attach to legal title a trust for payment, and where second mortgage for different debt is given, note is no prior lien. *Carpenter v. Duke*, 144—291.

Defendant's cause of action accrues upon registration of junior grant to plaintiff's grantor, and ten years statute of limitations runs from registration. *Johnston v. Lumber Co.*, 144—717.

Registered deeds can be put in evidence, when otherwise compe-

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tent, though registered during trial. *Johnston v. Lumber Co.*, 144—717.

Registration of deed raises presumption of delivery. *Smithwick v. Moore*, 145—111.

Where testator and first wife gave deed and will to defendant, who kept both, without registration, till testator's death, and afterwards another will conveying everything to second wife was executed, defendant is owner of land described in deed. *Ibid*, 145—111.

Distinction with reference to registration of deeds and grants, pointed out. *Dew v. Pyke*, 145—302.

Rights of owner under unregistered deed, discussed. *Ibid*, 145—305.

Revisal, section 980 (*Connor Act*) does not apply where defendants and their ancestor were possessed of land under unregistered deed twelve years prior to December 1, 1885, and their deed was recorded after that of plaintiff. *McNeill v. Allen*, 146—284.

A registered deed would not put parties upon inquiry of matters of fraud not appearing upon its face, and would not fix them with notice of fraud. *Tuttle v. Tuttle*, 146—493.

Holders of property to secure pre-existing debts are purchasers for value within the meaning of our registration laws, and would hold property if deed was good. *Odom v. Clark*, 146—554.

Statute requiring crop liens to be in writing and registered, is only required so as to make claim good as against creditors and third persons, and to entitle holder to superiority given by statute over all other liens, except those of landlord and laborer. *Ibid*, 146—551.

Defendants sold horse and buggy to one Fisher on June 10th and took a mortgage thereon; next day Fisher sold to plaintiff who had no notice of unregistered mortgage. Defendants told plaintiff they had a mortgage on property, and he offered to return it. On June 14th

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plaintiff learned that mortgage was not recorded and he brought claim and delivery. Mortgage was recorded June 18th. Held: There was no surrender in law and plaintiff was entitled to recover value of property at time it was wrongfully taken. *Taylor v. Mills*, 148—417.

Revisal 980 contains no limitation as to time when conveyance shall be registered. It simply provides that it shall not be valid against creditors or purchasers for value, except from registration. *Cozad v. McAden*, 148—11.

Contracts to convey land are included in our registration laws. *Combes v. Adams*, 150—68.

Contract to convey land valid inter partes, though unregistered. *Freeman v. Bell*, 150—149.

Recital in subsequent registered mortgage that article was free of an encumbrance except (unregistered) chattel mortgage to seller of article, is not notice. *Piano Co. v. Spruill*, 150—169.

Mortgage signed by corporation in its name, by its president, attested by secretary, corporate seal attached, and was probated upon examination of witness, valid though Register omitted to record corporate seal. *Edwards v. Supply Co.*, 150—175.

When law does not require or authorize instrument to be recorded, copy of record is not admissible in evidence. In re *Thorp*, 150—491.

Question is open whether survey of "floating entry" will put a subsequent enterer and a prior grantee upon notice. If original entry was so vague and uncertain as to fail to give notice of boundaries intended to be entered, we are unable to perceive how a mere survey, without making lines, affords any notice. But Revisal 1722 now requires that record of survey be kept so as to give notice. *Lovin v. Carver*, 150—712.

Indexing.—Filing of deed for registration is in itself constructive

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notice, and failure to index it after registration cannot impair its efficacy. *Lumber Co. v. Satchwell*, 148—317.

Rehearing.

See Appeal; Petition to Rehear.

Relator.

See Action, upon relation of state; Penalties.

RELEASE AND DISCHARGE.

Where plaintiff executed full release, but denied that it contained the terms of settlement, and there was evidence of negligence and fraud, question was for jury. *Hayes v. R. R.*, 143—125.

See Payment; Accord and Satisfaction.

RELIGION.

Verdict rendered on Sunday, valid. *Tuttle v. Tuttle*, 146—493.

REMAINDERS AND REVERSIONS.

Generally.—Contingent remainderman cannot maintain action for waste. *Latham v. Lumber Co.*, 139—9.

Interest of contingent remainderman in timber will be protected from waste by court of equity by injunction. *Ibid*, 139—9.

Owner of inheritance may maintain action for waste. *Ibid*, 139—9.

Remainderman or reversor may maintain action for trespass committed which impairs value of inheritance. *Cherry v. Canal Co.*, 140—422.

Upon death of remainderman, previous disposition of interest terminates, and heirs at law of remainderman entitled to immediate enjoyment of property. *Hooker v. Bryan*, 140—407.

Upon execution sale of life tenant's interest, and subsequently by purchaser to him, seven years adverse possession would not run against remainderman till his death. *Norcum v. Savage*, 140—472.

Dower not allowed in reversion

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or remainder expectant upon an estate of freehold. *Redding v. Vogt*, 140—562.

Where an estate is conveyed to trustee to preserve contingent remainders, statute will not execute the use. *Cameron v. Hicks*, 141—21.

Where doubtful language is used by testator, court inclines to that construction which makes title to property left in remainder vested, rather than contingent. *Freeman v. Freeman*, 141—99.

Appearance by representation has never been applied to divesting of vested remainder, or in any case where those who are entitled are in esse and may be before the court. *Card v. Finch*, 142—140.

Conveyance by life-tenant or remainderman of estate to them in trust, and conveyance by trustee to them after death of life-tenant's husband, carries perfect title. *Smith v. Moore*, 142—278.

Under Rev. 1590, upon application of all parties in interest, and trustee representing contingent remaindermen, court may direct private sale where it appears of interest to parties. *McAfee v. Green*, 143—411.

Contingent Remainders.—The devise in this case construed a contingent remainder, the children having died before the life tenant and without leaving issue. *Staton v. Godard*, 148—435.

Estate.—Lands devised to daughter for life "and after her death the said lands are to go to the children of my said daughter and the children of such as are dead," life-tenant who is living, had several children, one of whom married and died, leaving plaintiffs, the issue of such marriage, plaintiff has contingent remainder. *Latham v. Lumber Co.*, 139—9.

One indebted cannot devise contingent limitations to parties not in esse to prevent sale for his debts. *Carraway v. Lassiter*, 139—145.

Sale by sheriff, under Revenue Act of 1874, of life estate for taxes,

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does not convey remainder. *Smith v. Proctor*, 139—314.

REMEDIES.

Generally.—Remedies of purchaser when sale affected by actionable fraud. *May v. Loomis*, 140—351.

Defendant obtained property by fraudulent representations, plaintiff may sue for damages for false warranty, or repudiate trade and recover specific property. *Joyner v. Early*, 139—49.

Where stock wrongfully sold after legal tender of amount due, mandamus proper for issue of new stock upon payment of balance due. *Wilson v. Tel. Co.*, 139—395.

Election applies where there are inconsistent remedies, not to co-existing ones. *Machine Co. v. Owings*, 140—503.

One who demands equitable relief must specially allege the facts upon which he seeks aid of court. *Buchan v. Herring*, 141—39.

When parties to illegal contract are in *pari delicto*, court will not grant relief, though one obtains advantage over other. *Edwards v. Goldsboro*, 141—60.

Not necessary that illegal transaction be fully executed, to deprive one of right to repudiate and recover money paid thereon. *Ibid*, 141—61.

Law gives no action to a party upon an illegal contract. *Ibid*, 141—72.

In condemnation proceedings court can help injured owner only as to compensation, not as to method of taking. *Durham v. Riggsbee*, 141—128.

Injunction proper remedy to prevent fouling stream by improper use. *Durham v. Cotton Mills*, 141—615.

Injunction and receivership lie to prevent threatened destruction or removal of property, pending proceeding for partition. *Thompson v. Silverthorne*, 142—13.

Four remedies given servant wrongfully discharged, when con-

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tract entire, and to be paid in installments. *Smith v. Lumber Co.*, 142—26.

If purchaser fails to pay for goods delivered and evinces purpose not to pay for future delivery, vendor may rescind and sue for those delivered. *Grocery Co. v. Bag Co.*, 142—174.

Citizen injured by erection of nuisance on private premises in violation of an ordinance, has right to criminal prosecution, injunction or abatement. *Hull v. Roxboro*, 142—453.

Citizen cannot call upon courts to interfere with control of corporate property until he has first applied to corporation to take action, and it refuses, unless there is fraud, or threatened act is *ultra vires*. *Merimon v. Paving Co.*, 142—539.

Where verdict gives plaintiff right to fund in bank as against one defendant, who is insolvent and has attempted to misappropriate it, payment of cashier's check, endorsed to non-resident defendant, will be restrained till rights of parties determined. *Mfg. Co. v. Summers*, 143—102.

Action of trespass *quare clausum fregit* is appropriate remedy for wrongful invasion of another's possession of realty, and to recover plaintiff must show that he had actual or constructive possession at time of alleged injury. *Gordner v. Lumber Co.*, 144—110.

Temporary damage sustained by property, and injunction, is the remedy for unlawful and unwarranted acts of railroad in management of its terminal, amounting to a nuisance. *Taylor v. Ry.*, 145—407.

Plaintiff is entitled, irrespective of his prayer for relief to any remedy to which the facts alleged and proven, entitle him. *McCulloch v. R. R.*, 146—316.

See *Bradburn v. Roberts*, 148—218.

While distinction between actions at law and suits in equity is abolished, equitable rights and remedies are not thereby destroyed and no such result follows the change

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in the forms of procedure. *Rudisill v. Whitener*, 146—413.

When one promises to hold land for himself and another, but takes title in his own name, remedy is not specific performance of contract, but enforcing the execution of a trust. *Russell v. Wade*, 146—122.

Closing a by-street is a ministerial act and within the proper act of the town authorities, who are charged with supervision of such matters, and remedy is not by appeal to courts. *Trotter v. Franklin*, 146—555.

In absence of fraud in procuring execution of contract, the parties are generally left to pursue their remedy for damages for its breach, where, in the nature of the transaction they afford adequate compensation. *Braddy v. Elliott*, 146—581.

In action to cancel deed of exchange to defendant, in which he contracted to erect certain houses upon the land of plaintiff, in absence of finding of fraud, plaintiffs are entitled to recover the balance of purchase money and interest, in case defendant has failed to erect the houses as required by terms of exchange and to have sum awarded charged against lot conveyed to defendant. *Ibid*, 146—582.

A public nuisance is actionable only when a private injury is sustained by plaintiff. He must state and prove facts sufficient to show what the duty is, and that defendant owes it to him. *McGhee v. R. R.*, 147—145.

When landlord and tenant have adequate remedy by claim and delivery but do not resort to it, they may bring action in superior court (Rev. 1995) to determine any matters in controversy between them. *Talbot v. Tyson*, 147—275.

Remedy when superior court refuses to obey mandate of supreme court is by mandamus. *Tussey v. Owen*, 147—338.

Mandamus to compel collection of sufficient poll tax under constitution, is proper remedy in action by

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tax-payer contending that tax levied does not observe constitutional equation between poll and property tax. *Ibid*, 148—225.

Injunction is appropriate remedy for avoiding enforcement of illegal or unconstitutional tax. *R. R. v. Commrs.*, 148—225.

Breach of contract entitles plaintiff to nominal damages at least. *Clothing Co. v. Stadiem*, 149—8.

If vendee refuses to pay for and receive goods, vendor may either rescind the contract or resell the goods and recover from vendee the difference in price, and for this purpose he acts as agent for vendee and must use diligence and utmost good faith. *Clothing Co. v. Stadiem*, 149—8.

In action of vendor to recover for breach of contract for purchase of goods, he may recover storage and interest on purchase price while making reasonable and proper efforts to sell goods. *Ibid*, 149—8.

In action to restrain collection of taxes, where city limits are extended, perpetual injunction is proper remedy, and where judge refuses to enjoin the exercise of jurisdiction over the annexed territory, he must necessarily determine the case upon its merits. *Lutterloh v. Fayetteville*, 149—67.

Court will not lend itself to establish a right growing out of a fraudulent transaction, but this principle only applies when it becomes necessary to invoke the aid of the court to establish or assert the right arising by reason of such a transaction, and does not obtain when the right otherwise exists. *Gaylord v. Gaylord*, 150—235.

Upon failure of lessor to put lessee in possession, in breach of contract or lease, the injury immediately ensues, and cause of action arises without necessity of tender of rent by lessee. *Sloan v. Hart*, 150—274.

When statutes give new and additional remedies for enforcement of rights and duties given or imposed by common law, unless a contrary intention is manifested, courts will

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not assume that legislature intended to enlarge or modify the common law right or duty. *Garrison v. R. R.*, 150—579.

Election of.—When action can be brought either in tort, for wrongful conversion, or upon contract, the courts in favor of jurisdiction, will sustain the election of plaintiff. *White v. Eley*, 145—36.

Bringing action in one court, when it might have been brought in another, is *prima facie* an election of remedies. *Ibid*, 145—36.

Plaintiff is not required to claim damages caused by wrongful seizure and detention of his property in action for claim and delivery, but may recover therefor in another action. *Bowen v. King*, 146—390.

Personal.—Where there has been a wrongful entry and trespass on one's land and he afterwards conveys land to another, right to recover for wrong is personal to him who owned land when same was committed. *Porter v. R. R.*, 148—566.

REMITTER.

On appeal from justice's judgment, when amount involved is doubtful, it may be made clear by a remitter sufficient to confer jurisdiction, even if remitter is retroactive. *Teal v. Templeton*, 149—34.

REMOVAL OF CAUSES.

Where the right to remove to the federal court is doubtful the court will refuse to do so, and the circuit court will remand. *Tobacco Co. v. Tobacco Co.*, 144—368.

Revisal 4701, authorizing revocation of license of foreign insurance company when it attempts to remove case to federal court, it valid. *Ins. Co. v. Commr.*, 144—442.

Revisal 4701 does not apply to removal of a cause in which agent sues for services rendered. *Ibid*, 144—442.

Motion to remove cause from one county to another, when complaint filed and time to answer expired, is too late. *Garrett v. Bear*, 144—23.

REMOVAL OF CAUSES.

Agreement between counsel for time to file answer is acceptance of jurisdiction and waiver of right to remove. *Ibid*, 144—23.

Motion to remove must be made in district and during term of court. *Ibid*, 144—23.

Refusal to remove cause for convenience of witnesses and in interest of justice, not reviewable. *Ibid*, 144—23.

Diverse citizenship.—For purpose of jurisdiction a corporation is a citizen of State creating it and cannot remove a suit to federal court for diversity of citizenship by actual authorized consolidation with foreign corporation, and a change of principal place of business, or domicile, to another State, prior to commencement of action. *Staton v. R. R.*, 144—136.

Where cause is sought to be removed to federal court for diversity of citizenship, allegation that defendants believe that joinder of resident defendants was to defeat federal jurisdiction, and not in good faith, will not be considered in absence of finding of fact. *Tobacco Co. v. Tobacco Co.*, 144—352.

In motion to remove to federal court for diversity of citizenship, where railroad and its servants are joined, it is necessary for removing defendant to allege and prove fraudulent purpose in making a resident servant a party. *Hough v. R. R.*, 144—701.

In motion to remove, mere insolvency of a defendant cannot be permitted alone to determine plaintiff's right to join him in action if he is liable for tort. *Ibid*, 144—703.

Suit cannot be removed to federal court for diversity of citizenship by corporation of another State which purchased property of corporation of this State under mortgage sale made by virtue of Code Sec. 697. *Ice Co. v. Ry.*, 144—732.

To remove cause from State to federal court, it is not sufficient that defendants have separate defenses, and one of them is a non-resident. Plaintiff is entitled to

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pursue his remedy in his own way, provided he does so in accordance with the rules of pleading and practice. *Davis v. Rexford*, 146—424.

Where contract sued on is void under the statute of frauds, this defense is not open to defendants on motion to remove to federal court. *Ibid*, 146—425.

The fraudulent joinder of non-resident defendants to prevent removal to federal court, is a matter for that court to pass upon. *Ibid*, 146—425.

Local prejudice.—Practice of allowing one to select the county to which cause is to be removed, is not commended, and if excepted to at time might be reversible error. *State v. Harrison*, 145—410.

Refusal to remove cause to another county for trial is not reviewable. *State v. Turner*, 143—641.

Refusal to remove cause for convenience of witnesses and in interest of justice, not reviewable. *Garratt v. Bear*, 144—23.

Petition and bond for.—Petition for removal to federal court filed after statutory period has expired, comes too late even though within time allowed for answering by court. *Bryson v. R. R.*, 141—595.

When a money judgment is demanded, right of removal is determined by sum demanded, as appears by record at time petition is filed. When amendment is made, last sum demanded "is matter in dispute." *McCulloch v. R. R.*, 149—310.

After petition and bond for removal are filed, jurisdiction of State court ceases eo instanti and it can make no order except that further proceedings be suspended, nor can plaintiff submit to nonsuit. *Ibid*, 149—310.

Right of foreign defendant to remove cause to federal court is to be decided upon pleadings and record as they are when petition is filed. *Davis v. Rexford*, 146—424.

Separable controversy.—Where resident directors and foreign cor-

REMOVAL OF CAUSES.

poration are used as joint tortfeasors, controversy is not separable and will not be removed to federal court. *Tobacco Co. v. Tobacco Co.*, 144—352.

Question of separable controversy is alone determined by record at time of filing petition (to remove.) *Hough v. R. R.*, 144—692.

Two defendants committing a tort to injury of plaintiff are jointly and severally liable, and when he brings single action against them, the cause is not separable, and cannot be removed by foreign defendant to federal court, though different answers made and different defenses relied on. *Staton v. R. R.*, 144—135.

One may sue tort-feasors jointly or severally at his election, and if he elects to sue them jointly, he has the right to have the case tried as for a joint tort, and no separable controversy is presented. *White v. R. R.*, 146—342.

Action for trespass against lessor and lessee railroad companies for tortious acts committed by lessee outside of business of lessee company, presents a separate cause of action. *McCulloch v. R. R.*, 149—309.

RENEWAL.

When married woman executed her note, secured by mortgage on her separate property, and such note was used as collateral by payee, original note is not discharged by renewals of notes given by payee. *Flitts v. Grocery Co.*, 144—463.

Rents.

See *Landlord and Tenant*, rent.

REPLY.

Generally.—Where statute of limitations is pleaded, no reply to it is necessary. *Oldham v. Rieger*, 145—260.

Where complaint alleges title and right of possession, reply showing how they were acquired may be filed, though there was no counterclaim alleged. *White v. Carroll*, 146—234.

RES ADJUDICATA.

On appeal from justice's judgment to superior court, trial is *de novo* and judge may allow reply to be filed to counterclaim. *Teal v. Templeton*, 149—34.

Repudiation of Contract.

See *Contracts*, rescission.

REPUGNANT CLAUSES.

A proviso utterly repugnant to body of contract and irreconcilable with it, will be rejected. *Jones v. Casualty Co.*, 140—262.

RES ADJUDICATA.

Administrative order of court not *res adjudicata*. *Mills v. Lumber Co.*, 139—524.

The judgment is decisive of points raised by pleadings, or which might properly be predicated upon them. This does not embrace any matters which might have been brought into the litigation, or any causes of action which plaintiff might have joined, but which, in fact, are neither joined nor embraced in the pleadings. *Shakespeare v. Land Co.*, 144—521.

Party to action is bound by judgment regularly entered dismissing it, but not by terms of agreement to which he was not a party, and as to latter it is not *res adjudicata*. *Ibid.*, 144—517.

Generally, the plea of *res adjudicata* applies not only to matters actually adjudged, but to every other question which properly belonged to the subject matter of the issue, and which the litigants by reasonable diligence could have brought forward. *Mfg. Co. v. Moore*, 144—529.

When appeal has been decided, supreme court has no power to modify decree after its opinion has been certified down. *Nelson v. Hunter*, 145—335.

Where defendant, in former action for value of goods, admitted goods were lost while in his possession, judgment was rendered for plaintiff and it was paid, and in this action to recover penalty for fail-

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ure to settle former claims for loss in sixty days, it may not now set up defense that goods were in fact never received by it. *Southerland v. R. R.*, 148—445.

Where plaintiff sued in forma pauperis, and was subsequently required by judge to give bond, whereupon he took a nonsuit, he may institute new action in forma pauperis, within one year, and former order requiring giving of bond is not res adjudicata. *Rich v. Morlsey*, 149—43.

Where in former action it was held that defendant in this action had performed his contract to repair vessel of present plaintiff, he is estopped to claim damages arising from defective work done thereon. *Bell v. Machine Co.*, 150—113.

When a judgment expressly reserves the rights of one of the parties litigant, without prejudice, it does not estop him from further asserting his rights. *Green v. Rodman*, 150—180.

Rescission.

See Contracts, rescission.

Res Gestae.

See Evidence, res gestae.

RESIDENCE.

One who leaves state for purpose of evading judgment in criminal action against him, and his whereabouts are unknown, is not entitled to exemptions. *Crower v. Self*, 149—167.

See Citizens, who are; Removal of Causes, diverse citizenship.

Restraint of Trade.

See Contracts, against public policy.

Resulting Trusts.

See Trusts, resulting.

Return.

See Summons, service; Process, return of.

REVERSIBLE ERROR.

Reversions.

See Remainders and Reversions.

Revenue Act.

See Taxation.

REVENUE.

Bills for raising.—When municipal charter has been passed in accordance with Art. II, sec. 14, of the constitution, requiring aye and no vote to be taken on the several days, it is not necessary for act annexing territory thereto to be passed in like manner to confer authority for levy of taxes in new territory. *Lutterloh v. Fayetteville*, 149—68.

REVERSIBLE ERROR.

What is.—To constitute reversible error, must appear that appellant's rights have in some way been prejudiced. *Hosiery Co. v. Cotton Mills*, 140—452.

In action against executor, evidence of services "rendered," though not in so many words, to testator, incompetent. *Stocks v. Cannon*, 139—60.

Introduction of note, with name of endorsee on back, not sufficient to vest title. *Tyson v. Joyner*, 135—69.

Court may set aside verdict, but has no power to reverse answer of jury. Action when not reversible error. *Sprinkle v. Wellborn*, 140—164.

Defendant's counterclaim good against his note. *Tyson v. Joyner*, 139—74.

Where court and jury failed to pass upon reasonableness of order of Corporation Commission, reversible error. *Corp. Com. v. R. R.*, 139—134.

Where two instructions are conflicting, and impossible to tell upon which the jury acted, error. *Pegram v. R. R.*, 139—303.

An instruction that imposed only one limitation upon right of employee to recover his employer's property endangered by fire, viz.,

REVERSIBLE ERROR.

he must not act "recklessly," is erroneous. *Ibid*, 139—303.

Juries should not only find the facts, but should draw their conclusions uninfluenced by acts or language of court, and language of charge "if you believe the evidence, defendant is guilty, and you will return a verdict of guilty," is improper, though standing alone, not reversible error. *State v. Simmons*, 143—614.

When judge correctly charged the law upon one phase of evidence, it is incomplete unless embracing the law as applicable to contentions of each party, and such is reversible error. *Jarrett v. Trunk Co.*, 144—299.

Not reversible error to refuse to submit an issue upon particular phase, where each party had opportunity to offer evidence bearing upon every phase of case under issues submitted. *Main v. Field*, 144—307.

It is reversible error for judge to charge jury that authorities argued by counsel to jury, under the statute, were directly against his position. *Perry v. Perry*, 144—328.

Not reversible error for judge to speak of plaintiff as "a boy only 12 or 13 years of age," when sustained by evidence. *Leathers v. Tob. Co.*, 144—331.

Practice of allowing one to select the county to which cause is to be removed, is not commended, and if excepted to at time might be reversible error. *S. v. Harrison*, 145—410.

Right of Way.

See Roads and Streets; Railroads, right-of-way; Eminent Domain.

RIPARIAN RIGHTS.

Grant of land bounded by non-navigable creek or river carries grantee to middle of stream. *Wall v. Wall*, 142—387.

See Rivers and Streams; Deeds, boundaries; Water Courses.

RIVERS AND STREAMS.

RIVERS AND STREAMS.

Generally.—Grant of land bounded by non-navigable creek or river carries grantee to middle of stream. *Wall v. Wall*, 142—387.

Where lands on both sides of non-navigable stream belong to same person, he owns entire bed of stream and all islands therein. *Ibid*, 142—388.

When public road is made after landowner has cut his ditches for drainage, he is not required to keep bridges in repair that are subsequently placed over them. *S. v. Davis*, 143—611.

One holds his land subject to natural disadvantages as to flood or surface waters, and is liable to adjoining owner for such damages as may result proximately from his erecting dam across natural flood channel of river on his own lands, whereby water is ponded upon lands of such adjoining owner. *Clark v. Guano Co.*, 144—65.

Wrong committed in blocking the flood-channel of a stream is of same character as that of one who closes natural drain-way on his own land and causes land of upper proprietor to be flooded by back-water. *Ibid*, 144—75.

Water, which in times of a freshet overflows the bank of a stream and is accustomed to flow over adjacent lowlands in a defined stream, is to be treated as a watercourse, rather than surface water, and riparian owner is not allowed to stop flow by erecting barriers to injury of another. *Ibid*, 144—76.

If a riparian owner can raise the banks of a stream so as to confine flood water and prevent its overflowing his land, without injury to property of others, he may do so, but he must suffer the consequences of any failure in the attempt. *Ibid*, 144—77.

Lower proprietor must receive surface water which falls on adjoining higher lands and naturally flows therefrom. Owner of upper land may accelerate the flow, but

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not divert it. *Greenwood v. R. R.*, 144—448.

Where a stream is a boundary, the slow, gradual, imperceptible accretion to the bank from the shifting of the stream belongs to the proprietor on the gaining side, and the stream remains the boundary. *Land Co. v. Lang*, 146—313.

Where plaintiff in partition proceedings was allotted mill and water power, he had right to enter upon lands of defendant for purpose of keeping open artificial channel of creek, erected by his ancestor, and to keep such dam in creek as will supply such a quantity of water for mill as ancestor used during his lifetime. But if dam is raised and defendant's land is sobbed, action lies. *Moore v. Parker*, 149—291.

Watershed.—In action for injunction against city acquiring property for watershed, which property will create an alleged nuisance, demurrer on ground that it does not appear that plaintiffs applied to commissioners to rescind contract of purchase, will not be sustained. *Jones v. North Wilkesboro*, 150—649.

Requisites for complaint in action to restrain purchase by city of watershed, alleged to create a public nuisance, stated. *Ibid*, 150—650.

Municipal corporation has no legal right to establish and maintain a condition which creates a public nuisance, per se. Injunctive power of court will be exercised with great caution, and only in a clear case. Defendant in this case is called upon to answer complaint. *Ibid*, 150—650.

ROADS AND STREETS.

Generally.—Working the roads is a necessary expense and county commissioners may levy a tax for such purpose without a vote of the people. *Crocker v. Moore*, 140—430.

What is a public way, always one of law. *Cozard v. Harwood Co.*, 139—283.

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Cartways are regarded as quasi-public roads, and condemnation of private property for such use has been sustained. *Cook v. Vickers*, 141—101.

Advisability of widening street is in discretion of aldermen and neither property owners nor courts can interfere. *Durham v. Riggsbee*, 141—128.

In condemnation proceedings court can help injured owner only as compensation, not as to method of taking. *Ibid*, 141—128.

Widening a street is a political and administrative measure of which defendant is not entitled to notice or to be heard. *Ibid*, 141—131.

When there is evidence tending to show that an alley-way has become a public way, rights of parties with reference to it are determined by rules applicable to highways. *Tise v. Whitaker*, 144—507.

When obstruction of alleyway causes special damage to abutting owner, it gives him a peculiar interest in the matter and may sue for wrong in his own name. *Ibid*, 144—508.

One is not estopped by his deed, including within its boundaries an alley used as a public way, from a claim to its use as a public way belonging to him as a citizen and incident to his ownership of an entirely distinct piece of property. *Ibid*, 144—508.

Deed purporting to convey alleyway is void as against those having an interest therein. *Ibid*, 144—508.

Dedication of public ways may be in express terms, or implied from owner's conduct, and while intent to dedicate is usually required, owners conduct may work a dedication though he had no actual intent. *Ibid*, 146—376.

Public way cannot be acquired by adverse user, and by that alone, for any period short of 20 years. When it is dedicated by the owner to the public, time of user is no longer material. *Ibid*, 146—376.

Where owner of land sought to be established as a public alley,

ROADS AND STREETS.

moved back his fence for public convenience; abutting owner made improvements indicating it; alley was used by public in passing and working it with grantor's knowledge, evidence is for jury as to dedication and acceptance. *Tise v. Whitaker*, 146—377.

When a street was laid out and described in map of town in 1841, and plaintiff has purchased land abutting on that street, but it has never been used as a public way, and legislature has since authorized its sale to defendants, nuisance does not lie for closing up street. *Church v. Dula*, 148—266.

City is liable to owner for his land taken in widening its streets, in full of amount of damages, reduced by value of benefits conferred by improvements; and owner is entitled to recover therefor as distinguished from doing work in unskillful manner. *Quantz v. Concord*, 150—540.

Where section of proposed town was laid off on map, but it was cut off, conveyed to defendant and town quit-claimed its rights in streets and alleys, which were never used, action to compel defendant to open up streets is barred in ten years. *State Co. v. Finley*, 150—728.

Rights of abutting owners.

When a street was laid out and described in map of town in 1841, and plaintiff has purchased land abutting on that street, but it has never been as a public way, and legislature has since authorized its sale to defendants, nuisance does not lie for closing up street. *Church v. Dula*, 148—266.

Appeal from commissioners.

Where new road has been laid off and old road abandoned, court will not restrain working of new road pending appeal of landowner. *Sutphin v. Sparger*, 150—519.

Owner's appeal from order confirming report of road commissioners should be taken at same session of county commissioners. *Ibid*, 150—518.

RULE IN SHELLEY'S CASE.

Dedication.—A sale of lots in accordance and recognition of a map or plat in which streets are laid out constitute a dedication of the streets to the use of the purchasers and the public. *Balliere v. Shingle Co.*, 150—637.

Use by defendant of strip of land adjoining its lot, and described in its deed as a street, though never opened up and worked by city, is not a trespass. *Ibid*, 150—638.

Grading.—Where a municipal corporation has authority to grade its streets, it is not liable for consequential damages, unless work was done in an unskillful and incautious manner. *Dorsey v. Henderson*, 148—425.

When commissioners changed original plans for grading sidewalks, and damages are claimed by property owner on that account, courts are precluded from inquiring into advisability of change, when commissioners have adopted and approved it. *Ibid*, 148—428.

Use of streets.—Railroad company has the right to use streets of town for railroad purposes, with assent of town commissioners. *Griffin v. R. R.*, 150—313.

Rules.

See Appeal, rules of supreme court; Negligence, abrogation of rule, violation of rule.

RULE IN SHELLEY'S CASE.

Applies.—"Heirs now living," "children," "issue," etc., are words of limitation or purchase as will best accord with manifest intention of him who employs them. *Smith v. Proctor*, 139—314.

Land is given by will to P "for life, and after his death to his heirs (lawful) forever," rule in Shelley's case applies. *Pitchford v. Limer*, 139—12.

Devise of "the use and benefit and profit of one's land during her natural life, and to the lawful heirs of her body after her death,"

RULE IN SHELLEY'S CASE.

conveys fee. *Perry v. Hackney*, 142—368.

Deed to J and the heirs by her present husband, and assigns, to her only use and behoof, is fee simple. *Jones v. Ragsdale*, 141—200.

Devise of "rents, issues and income" of lands passes the land itself. *Perry v. Hackney*, 142—372.

Devise of lands in trust to one, and after his death to his issue forever, when it appears in an ulterior limitation that the words "issue" and "children" were used in the will as correlative terms, passes only an equitable estate for life to the first taker, and an equitable estate in fee to his children. *Faison v. Odom*, 144—107.

For the Rule in Shelley's Case to apply, estate must be given to the heirs or heirs of the body as an entire class or denomination of persons, and not merely to individuals embraced within such class. *Ibid*, 144—109.

Land devised by testatrix to three daughters during their natural lives and the natural lives of the survivors, with remainder over to heirs at law, providing that should any of daughters die without issue of her body the share of such daughter shall go to other daughters, conveys joint estate in fee under rule in Shelley's case. *Walker v. Taylor*, 144—175.

Estate herein conveyed is fee simple under Rule in Shelley's Case. *Lamb v. Major*, 146—533.

Estate to son for life, and at his death to his surviving heirs, is a fee. *Price v. Griffin*, 150—523.

Where question was whether life estate or fee was conveyed, clause of warranty which contains a covenant for quiet enjoyment to grantor for life and then to his "surviving heirs," will be considered to ascertain grantor's intention. *Ibid*, 150—527.

Devise to daughter and her heirs forever, gave a fee, and subsequent clause providing that "above devised lands shall not be disposed of, but shall descend to

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the children of my above mentioned daughter," is contrary to public policy and void. *Foster v. Lee*, 150—688.

Does not apply.—Rule in Shelley's Case, when does not apply. *Smith v. Proctor*, 139—314.

Rule in Shelley's Case does not apply where conveyance is "to belong to his lawful heirs, share and share alike," etc. *Gilmore v. Sellers*, 145—283.

SALARIES AND FEES.

While office of sheriff is constitutional, regulation of fees is within control of legislature, and same may be reduced during term of incumbent. *Coms. v. Stedman*, 141—448.

Office of Register of Deeds is constitutional and legislature may change the duties and diminish the emoluments if public welfare requires. *Fortune v. Coms.*, 140—323.

See Costs.

SALES.

Generally.—Contract to sell grano and hold lien bonds as collateral security, effect of. *Chemical Co. v. McNair*, 139—326.

Where stock wrongfully sold after legal tender of amount due, mandamus proper for issue of new stock upon payment of balance due. *Wilson v. Telephone Co.*, 139—395.

Tender of unpaid balance due on stock, before sale, subsequent sale void. *Ibid*, 139—395.

Market value of property is price it will bring when offered for sale by one who desires to sell, and purchased by one not compelled to buy. *Brown v. Power Co.*, 140—333.

In ejectment, where plaintiff after institution of action, conveys by deed in fee, error to refuse defendant's motion for nonsuit. *Burnett v. Lyman*, 141—500.

Measures of damages for breach of contract in failing to deliver goods having market value. *Hosiery Co. v. Cotton Mills*, 140—452.

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Law does not permit one to keep property in possession over a year, without complaint as to quality, and then defend upon ground that goods are not up to contract. *Main v. Griffin*, 141—44.

Power to agent to sell, presumed for cash. *Winders v. Hill*, 141—694.

Any conduct practiced at auction sale for purpose of stifling competition, or false representations or deceptions employed to acquire property at less than its value, is a fraud and vitiates sale. *Davis v. Keen*, 142—497.

If one sells an article for a particular purpose, he thereby warrants it fit for that purpose. *Main v. Field*, 144—311.

An agreement made between debtor and secured creditors that, at a sale of lands under deed of trust, property should be bid in at a sum not less than that sufficient to pay such creditors, is valid, when there is no purpose to reduce price below market value. *Satterfield v. Kindley*, 144—455.

Evidence here indicates a sale of property and not a mortgage. *Leak v. Bank*, 149—19.

To hold bargainor in sale responsible for warranty, it need not be made in express terms; and if seller makes an affirmation of a material fact at time of sale, as an inducement, and it is accepted and reasonably relied on by buyer, it is sufficient. *Harris v. Cannady*, 149—82.

Manufacturer of intoxicating drink in selling through its agent warrants against latent defects that article is merchantable and can be lawfully sold by purchaser if bought for resale. *Mfg. Co. v. Davis*, 147—270.

In action for breach of warranty in contract for sale of engine, measure of damages is difference between value of engine received and what it would have cost to purchase such an engine as that described in contract and warranty. *Mfg. Co. v. Oil Co.*, 150—151.

Where manufacturer of intoxi-

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cating drink through its agent sold goods to defendant, warranting drink to be nontaxable, and subsequently he was required to pay government license, plaintiff was liable for value of tax paid and such damages as were the natural and direct consequence of breach of warranty. *Mfg. Co. v. Davis*, 147—270.

Auction.—Valid auction sale, defined. *Henderson Co. v. Polk*, 149—108.

By sample.—In sales by sample there is implied warranty that bulk is of equal quality to sample, or at least merchantable, and in action to rescind for fraud, evidence that plaintiff made the goods; that they were sold by sample, apparently all right and up to sample when received, and appearance calculated to deceive, that in reality it was cheap and worthless, sufficient to sustain affirmative finding by jury. *Main v. Field*, 144—307.

Where goods sold by sample are defective, and defects are latent, buyer's right of inspection includes reasonable time to make examination, and this is for jury. *Ibid*, 144—310.

Conditional.—Written contract called a lease in which one "hires to the use of" another, articles at a fixed rental in installments, construed as a conditional sale. *Hamilton v. Highlands*, 144—279.

Under conditional sale, defendant may redeem by paying amount due, with interest and costs, or, in default, court will order property sold to pay debt, and surplus paid to defendant. *Ibid*, 144—279.

Defendant may elect to regard contract as lease and terminate it, or avail himself of provisions of forfeiture clause by surrendering property any time before full time for payment has expired. *Ibid*, 144—279.

Contracts for sale on installments are similar to mortgages, and equity is not destroyed because

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rent or installments of purchase price are not promptly paid. *Hicks v. King*, 150—371.

Hours of.—Statute with reference to hours of public sales does not apply to private sale by administrator. *Odell v. House*, 144—649.

Judicial.—In absence of fraud, purchaser at judicial sale only required to see that court had jurisdiction of person and subject matter. *Carraway v. Lassiter*, 139—146.

Complaint alleging that plaintiff purchased at commissioner's sale, 416 acres of land, tract contained only 320; cause of action set up. *Peacock v. Barnes*, 139—196.

Land sold other than by judicial decree, no implied warranty as to title, quantity or encumbrances. *Ibid*, 139—196.

For relief from defect of title or shortage in judicial sale, action must be brought to attention of court before payment and confirmation. *Ibid*, 139—193.

Land of decedent against whose executor judgment has been obtained, cannot be sold through commissioner by order in cause, even though land subject to lien of attachment levied during decedent's lifetime. *Atkinson v. Ricks*, 140—421.

Where summons in special proceeding for partition is not in record, though otherwise regularly conducted, sale valid. *Rose v. Davis*, 140—266.

Interest of vendee in contract for purchase of property not subject to execution sale. *May v. Getty*, 140—311.

Finding by judge that sum bid for land sold by executor for assets was inadequate, refusal to confirm sale was proper. *Harrell v. Blythe*, 140—415.

Judicial sales are only conditional and not complete till reported to and confirmed by court. *Ibid*, 140—415.

A decree for absolute sale, without requiring report to be submitted for further consideration by

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court, is irregular and will be set aside upon motion. *Williams v. McFadyen*, 145—159.

Purchaser at judicial sale only required to know that court had jurisdiction of subject matter and person. *Card v. Finch*, 142—140.

Interest of vendee in bond for title, not subject to sale under execution upon judgment rendered for purchase money. *McPeters v. English*, 141—491.

Purchaser under order of court or judgment need only inquire if upon the face of the record the court apparently has jurisdiction of parties and subject matter, in order to be protected, provided he buys in good faith and without notice of any actual defect. *Rackley v. Roberts*, 147—207.

Every person buying at a bankrupt sale, as at one made by the sheriff, must take notice that nothing is sold except the interest of bankrupt or defendant in execution. *Supply Co. v. Machin*, 150—746.

Puffing of wares.—Fraudulent promises as to future, as to what vendee could do with property, how much he could make on it, etc., do not constitute legal fraud. *Williamson v. Holt*, 147—522.

Commendatory expressions or exaggerated statements as to value of prospects, by puffing up value and quality of goods, or holding out flattering prospects of gain, are not regarded as fraudulent in law. *Ibid*, 147—520.

When assurances of value are seriously made, intended, accepted and reasonably relied upon as statements of facts, inducing a contract, they may be so considered in determining whether there was fraud, and if declaration is in form of an opinion or estimate and there is doubt as to whether they were intended and received as expressions of opinion, question is for jury. *Whitehurst v. Ins. Co.*, 149—276.

Tax.—Sale by sheriff, under revenue act of 1874, of life estate for

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taxes, does not convey remainder. *Smith v. Proctor*, 139—314.

Sheriff's deed only presumptive evidence that notice to delinquent tax payer was given, but notice required to be given by purchaser must be proved. *Matthews v. Fry*, 141—582.

Purchaser at tax sale acquired no title where sheriff failed to notify delinquent tax payer. *Ibid*, 141—582.

Requirement of purchaser's making affidavit as to notice is condition precedent to right to call for tax deed. *Ibid*, 141—582.

Title of one not impaired where land sold for taxes, certificate of sale issued and no demand for deed made within two years. *Lbr. Co. v. Price*, 144—52.

Statute directing sheriff to make deed to land sold for taxes must be strictly construed and time limitation must be observed. *Mfg. Co. v. Rosey*, 144—370.

Purchaser of land at tax sale, who subsequently acquires invalid title for insufficient description, or void because not made in time, is entitled to have amount he has paid therefor declared a lien on land in his favor. *Ibid*, 144—370.

The husband, in whose name wife's land was listed for taxes, cannot, in his own right, attack sheriff's deed for taxes given to purchaser. *Eames v. Armstrong*, 146—2.

A tax deed regular upon its face is "color of title" though sheriff failed to bid in land sold for taxes when no one would pay tax for less number of acres than the whole. *Greenleaf v. Bartlett*, 146—495.

When entry and possession under tax deed are "under known and visible lines and boundaries," entry amounts to an ouster and 7 years adverse possession ripens title. *Ibid*, 146—495.

One under a legal or moral obligation to pay taxes cannot by neglecting to pay same, and allow-

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ing land to be sold in consequence of such neglect, add to or strengthen his title by purchasing at sale himself or by subsequently buying from a stranger who purchased at the sale. *Smith v. Smith*, 150—83.

Failure to record receipt for taxes paid on land sold by sheriff, goes to invalidate deed, and does not affect question of color. *Greenleaf v. Bartlett*, 146—495.

Purchase of land by mortgagee at tax sale does not extinguish equity of redemption. *Cauley v. Sutton*, 150—329.

Statute requiring actions to recover land sold for taxes to be brought within three years after execution of deed, does not apply to purchase made by mortgagee. *Ibid*, 150—330.

Warranty.—No specific form of words is necessary to constitute a warranty of soundness, yet there must be evidence that the seller, by some appropriate language, intended to make, and buyer understood that a warranty was being given. *Woodridge v. Brown*, 149—303.

In defense of action for goods sold, evidence of warranty is incompetent, where it is not set up in answer. *Ibid*, 149—302.

If plaintiff knew the purpose for which coal was to be used, defendant is not entitled to a reduction in price on account of its inferior quality, in absence of a warranty. *Ibid*, 149—303.

Sanitation.

See Public Health; Nuisance.

SATISFACTION.

Sending check "in full of account," not inclusive of amount claimed by plaintiff, which he received, endorsed and kept money, evidence sufficient to go to jury upon intent of full payment. *Armstrong v. Lonon*, 149—435.

See Accord and Satisfaction; Payment.

SCHOOLS.

SCHOOLS.

Generally.—Expense of public school system is not a necessary municipal expense. *Hollowell v. Borden*, 148—257.

Trustees of graded schools are created a municipal corporation by constitution. *Ibid*, 148—256.

Where a school has been established within less than three miles of another school in the township, Revisal 4129 does not prohibit the repairing of the oldest school house. *Pickler v. Board of Education*, 149—222.

Estimate of funds needed to carry on four months public school, prepared by board of education and submitted to commissioners, is not final and conclusive upon them. *Board of Education v. Comrs.*, 150—126.

Discretion of Board.—Duty of dividing townships into school districts and erection and maintenance of school buildings is left to judgment of school board, and in absence of allegation of misconduct, their action cannot be supervised or restrained by courts unless in violation of some provision of the statutes. *Pickler v. Board of Education*, 149—222.

Rebuilding of a school and change of site is in sound discretion of school committee and will not be restrained by the courts, unless in violation of some provision of law, or committee influenced by improper motives or misconduct on their part. *Vanable v. School Committee*, 149—121.

Districts.—Act creating graded school district and authorizing trustees to levy tax and issue bonds when act approved by majority of qualified voters, valid exercise of legislative authority. *Smith v. School Trustees*, 141—143.

School districts are quasi-public corporations, included in term "municipal corporations," as used in Art. VIII, sec. 7, of Constitution. *Ibid*, 141—143.

Act creating graded school dis-

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trict, including portions of two white and colored districts as established by board of education, valid, though no new registration ordered for entire electorate of new district. *Ibid*, 141—143.

Act creating school district within certain limits of town is not an unconstitutional discrimination between the two races, where there are no colored children within the district, and those who live in town outside the district have been provided for, is valid. *McLeod v. Comrs.*, 148—85.

Funds.—Act which undertakes to distinguish between races in regard to money apportioned from public school funds, invalid. *Lowery v. School Trustees*, 140—33.

Seal.

See Corporation, seal.

SEDUCTION.

Action for attempted seduction of wife lies in favor of husband, and vindictive damages may be assessed. *Braeme v. Clark*, 148—367.

See Arrest and Bail.

Seizin.

See Deeds, breach of covenant of.

Separate Estate.

See Husband and Wife; Married Women, contracts of.

Separation.

See Divorce and Alimony.

Servant.

See Master and Servant; Negligence; Railroads; Principal and Agent.

Service.

See Summons, service; Process.

Services.

See Contracts, implied; Parent and Child.

SET-OFF.**SET-OFF.**

Where one sells goods to purchaser without disclosing his agency, and purchaser has no knowledge that former is not owner of goods, he may, in action by principal for purchase money, set off a demand due him from such agent. *Moore v. Lumber Co.*, 150—268.

Severance.

See Removal of Causes, separable controversy; Action, joinder of parties.

SEWERAGE.

The principle that a corporation owing the duty to serve the public, charging reasonable and equal rates, cannot contract away its power to discharge such duty, applies to a sewerage company. *Soloman v. Sewerage Co.*, 142—439.

See Public Health; Nuisance.

SHERIFF.

Sheriff is proper party defendant in action to restrain collection of back taxes, but commissioners may make themselves parties if they desire. *Lumber Co. v. Smith*, 146—199.

While office of sheriff is constitutional, regulation of fees is within control of legislature, and same may be reduced during term of incumbent. *Comrs. v. Stedman*, 141—448.

See Summons, service; Process; Taxation.

Situs.

See Contracts, *lex loci*.

Slander.

See Libel and Slander.

Slaves.

See Marriages, slave.

SMALLPOX.

Where in pursuance of Rev. 4451, sanitary committee ordered vaccination and indicted plaintiff

SPECIFIC PERFORMANCE.

for refusal to submit, his acquittal would not warrant action for malicious prosecution. *Morgan v. Stewart*, 144—427.

See Public Health.

Special Appearance.

See Appearance, special; Jurisdiction.

SPECIAL PROCEEDINGS.

Where summons in special proceeding for partition is not in record, though otherwise regularly conducted, sale valid. *Rose v. Davis*, 140—266.

See Actions.

SPECIFIC PERFORMANCE.

Generally.—If plaintiff can give perfect title at time of trial, specific performance of contract will be decreed. *May v. Getty*, 140—311.

Where defendant in a written contract to convey land, asked plaintiff for a year's postponement of option and within the year plaintiff tendered purchase price, specific performance lies and defendant estopped from pleading Statute of Frauds. *Alston v. Connell*, 140—485.

An owner of land who would insist upon performance by prospective purchaser as condition precedent to action by latter for specific performance of option, must not himself be cause of breach. *Ibid*, 140—492.

Stipulation in contract for purchase that failure to make payments forfeits what has been paid, only gives vendor right to enter and in equity cannot bar specific performance. *Hairston v. Bescherer*, 141—205.

Enhanced value of land no reason to refuse relief. *Ibid*, 141—205.

Agreement must be mutual, terms certain and performance by court practicable. *Soloman v. Sewerage Co.*, 142—444.

In specific performance, a deed in line of vendor's title, executed under order of court, but was lost

SPECIFIC PERFORMANCE.

or mislaid, did not constitute a defect in his title. *Sutton v. Davis*, 143—474.

Where plaintiff sold house and lot to defendant, deed to be held by his attorney in escrow till note executed as agreed; defendant went in possession, added to building, had it insured and it was burned before note paid or deed delivered, defendant not entitled to any reduction from amount of note. *Ibid*, 143—475.

Doctrine of specific performance with compensation for defects, when vendor cannot convey what contract calls for, usually applied where defects urged as ground for compensation existed when contract was made, but it may be extended to cases in which defects arose afterwards. *Ibid*, 143—474.

While equity will, in absence of controlling conditions, direct specific performance of contract to convey land, this relief is not of absolute right, but rests in discretion of court. *Shakespeare v. Land Co.*, 144—525.

See *Jones v. Jones*, 148—360.

When in action for specific performance the defense is that subsequently the parties agreed that original contract was to be abandoned, conditioned upon conveyance of different tract, party relying upon compromise must show fulfillment of conditions therein in order to avail himself of the defense, and an offer to convey less number of acres than agreed upon, is insufficient. *Rivenbark v. Teachy*, 150—292.

A lease is a sufficient consideration to support specific performance of option to purchase therein granted, and lessor cannot withdraw it before the time in which to accept it has expired. *Pearson v. Mallard*, 150—307.

Compensation for defects.—As a general rule, a purchaser may, if he chooses, compel a vendor who has contracted to convey a larger interest in an estate than he has, to convey to him such interest as he is entitled to with compensa-

SPECIFIC PERFORMANCE.

tion. *Campbell v. Cronly*, 150—462.

Decreed.—Binding contract to convey land, when there has been no fraud or mistake or undue influence or oppression, will be specifically enforced, and mere inadequacy of price, without more, will not as a rule interrupt or prevent application of principle. *Combes v. Adams*, 150—68.

Specific performance is not a matter of absolute right, yet it will be granted when it is apparent, from a view of all the circumstances, that it will subserve the ends of justice and work no hardship upon him who has entered into contract. *Pearson v. Mallard*, 150—311.

Does not lie.—Where interest in lease has been sold to another, without notice of plaintiff's right, defendant could not be compelled to specifically perform his contract, as he could not convey title, and plaintiff's remedy is action for damages for breach of contract. *Burns v. McFarland*, 146—383.

There is a distinction between defense to an action to enforce specific performance of a contract, and to rescind and set it aside for fraud in the factum or treaty, and where pleadings and evidence show that former defense is being made, it is error to restrict issue to second defense. *Rudisill v. Whitener*, 146—407.

Where one is induced to execute contract to convey land by false representations that, as part of consideration, plaintiff would transfer to defendant an option on another lot which defendant desired, if he concluded not to buy, when he had already decided to buy, is available as a defense. *Ibid*, 146—408.

Specific performance denied when defendant has contracted under a mistake, to which plaintiff has by his acts, even unintentionally, contributed. *Ibid*, 146—409.

Court of equity will not compel purchaser to pay out his money

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for a doubtful title, when his contract entitles him to an indefeasible one. *Triplett v. Williams*, 149—399.

Parol evidence will be heard, not to contradict or vary written contract, but to put court in possession of all facts and circumstances surrounding treaty and entering into negotiation, that it may ascertain whether there was any element of fraud, mistake or unfair advantage taken by party seeking equitable aid of court. *Rudisill v. Whitener*, 149—441.

If one was induced to sign a contract to sell by a reasonably well grounded belief caused by plain-tiffs, without any intention on their part to mislead him, and that they would execute to him an option on other lands, which they have not done, court will refuse specific performance and leave plaintiffs to their action for damages, if they have sustained any. *Ibid*, 149—441.

Where plaintiff by a written contract agreed to purchase interest of defendant and other heirs if they would sign deed, and they refused to sell, and plaintiff would not take defendant's interest alone, specific performance does not lie where she has not tendered defendant's part of purchase price. *Mitchiner v. Wallace*, 150—642.

When one promises to hold land for himself and another, but takes title in his own name, remedy is not specific performance of contract, but enforcing the execution of a trust. *Russell v. Wade*, 146—122.

STARE DECISIS.

Rule of stare decisis does not forbid that former decision, upon matter of procedure, be disregarded, if it can be done without substantial injury to those who have relied upon precedent so established. *Grocery Co. v. Bag Co.*, 142—174.

A former adjudication of this court in construing a statute or organic law should stand when it has

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been recognized for years. *Hill v. R. R.*, 143—541.

After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself. *Ibid*, 143—541.

Stare decisis means that supreme court should adhere to decided cases and settled principles, and not disturb matters established by judicial determination. *Ibid*, 143—541.

There can be no vested right in decision of supreme court, but such decision is as a dormant stipulation in a contract, construed with reference to time it was made, and a subsequent overruling of decision by the same court will not disturb it. *Hill v. Brown*, 144—117.

Under doctrine of stare decisis, supreme court should adhere to its own decisions unless it clearly appears that they are wrong. *Johnson v. Tel. Co.*, 144—410.

A former adjudication of this court in construing a statute or organic law should stand when it has been recognized for years, and in such case the principle settled or the meaning given to the statute becomes a rule for guidance in making contracts, and also a rule of property. *Chappell v. White*, 146—576.

Doctrine of stare decisis does not require or permit that a court should adhere to a decision, found to be clearly erroneous, which affects injuriously a general business law. *Mason v. Cotton Co.*, 148—509.

The general principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but it never was the law. *Ibid*, 148—510.

To this the courts have established the exception that where a constitutional or statute law has received a given construction by courts of last resort, and contracts have been made and rights acquired

STARE DECISIS.

under and in accordance with such construction, such contracts may not be invalidated nor vested rights acquired under them impaired by a change of construction made by a subsequent decision. *Ibid*, 148—510.

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Entry.—When a valid entry is laid, followed by a survey and grant, a prior grantee claiming under subsequent entry will be declared to hold legal title in trust for subsequent grantee claiming under first entry. *Lovin v. Carver*, 150—711.

An entry void for uncertainty may be made certain and definite by subsequent survey, and grant based upon it will be valid. *Ibid*, 150—711.

Question is open whether survey of "floating entry" will put a subsequent enterer and a prior grantee upon notice. If original entry was so vague and uncertain as to fail to give notice of boundaries intended to be entered, we are unable to perceive how a mere survey, without making lines, affords any notice. But *Revisal*, 1722, now requires that record of survey be kept so as to give notice. *Ibid*, 150—712.

Paid for when.—In construing time when land entered shall be paid for, the Act begins from the year of entry and not the day. *Barker v. Denton*, 150—725.

Protest filed.—When it is alleged by enterer of vacant land that defendant protested his entries before time limited for him to take out his grant, and thus prevented him from doing so, pending proceedings to determine validity of protest, failure to allege that notice of entry was seasonably given would be but defective statement of cause of action, which answer would waive. *Garrison v. Williams*, 150—678.

Requirement that protest be filed within ten days after posting of notice of entry, is mandatory. It is a condition annexed to right of protest, and not a statute of limitation. *Ibid*, 150—677.

STATUTES.

STATEMENT.

Where one states to mercantile agency that he is a member of a firm, and subsequently notifies its traveling agent that his previous letter of information was sent through mistake, he is not liable for credit advanced upon strength of letter three months later. *Drewry v. McDougall*, 145—285.

See Evidence, declarations, financial condition.

STATUTES.

Class discrimination.—Statute regulating charges by railroad and other companies for failure to return overcharge wrongfully made, applies to all companies or persons engaged as common carriers and does not discriminate against defendant by excepting firms and individuals engaged in same service. *Eftand v. R. R.*, 146—135.

Construction of.—If minor invalid part of act may be eliminated without materially affecting general purpose of act, entire statute will not be declared void. *Lowery v. School Trustees*, 140—33.

Proviso relates generally to what immediately precedes it, yet if context requires, it may be construed as qualifying other sections. *Propst v. R. R.*, 139—397.

When duty imposed and power conferred upon public agency, by necessary implication duty and power to do thing in manner directed by constitution, attach. *Lowery v. School Trustees*, 140—33.

Where language used in statute is ambiguous, it is to be taken in such sense as will conform to scope of act and effectuate its object. *Fortune v. Coms.*, 140—322.

Use of inapt or improper terms will not invalidate a statute if real meaning can be gathered from context. *Ibid*, 140—322.

Misdescription or misnomer will not vitiate statute, if means of identifying person or thing intended is clear, certain and convincing. *Ibid*, 140—323.

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Repeal by implication or construction not favored, and they should not be extended to include cases not within intention of legislature. *S. v. Perkins*, 141—797.

Construction by contemporaneous legislation in matters of doubtful import, while not controlling, should be received as an aid to correct decision. *S. v. Baskerville*, 141—811.

Statute containing several sections not construed by words of any one section, but all taken together. *Grocery Co. v. Bag Co.*, 142—179.

See *Swinson v. Mt. Olive*, 147—612.

Whenever a power is given by statute, everything necessary to make it effective or requisite to attain the end is inferred. *Dewey v. R. R.*, 142—392.

Statute directing sheriff to make deed to land sold for taxes must be strictly construed and time limitation must be observed. *Mfg. Co. v. Rosey*, 144—370.

While penal statutes are to be strictly construed, their construction must not defeat the legislative intent. They should receive a reasonable interpretation, so as to effectuate that intention. *Harrell v. R. R.*, 144—536.

See *Alexander v. R. R.*, 144—93. *Cox v. R. R.*, 148—460.

Revisal, 1699, providing that junior grant shall not be color of title so far as it covers land previously granted, applies only to grants issued since March 6, 1893. *Weaver v. Love*, 146—417.

Revisal, 1388, requiring county commissioners to publish statement of county affairs, only applies to members of incoming board who hold office. *Shelton v. Moody*, 146—426.

While Revisal, 2073, gives one six months to close out stock of liquors, one is not entitled to new license for this term. *McIntyre v. Asheville*, 146—476.

Statute will not be declared retroactive unless it was clearly intended so to be, and especially where such

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a construction would take away rights acquired under a former law, though legislature would have the constitutional power thus to divest them. *Elizabeth City v. Comrs.*, 146—542.

The repeal of a statute repealing a former statute, leaves latter in force. *Odum v. Clark*, 146—553.

A former adjudication of this court in construing a statute or the organic law should stand when it has been recognized for years, and in such case the principle settled or the meaning given to the statute becomes a rule for guidance in making contracts, and also a rule of property. *Chappell v. White*, 146—576.

When the validity of an act comes in question, it should never be declared void except in a clear case. *S. v. Williams*, 146—624.

Laws respecting pilotage are not in derogation of, nor do they proceed from common law rights, and are liberally construed. *St. George v. Hardie*, 147—95.

In action to recover for placing poles on plaintiff's land, *Revisal*, 1571, applies only to right conferred upon telephone companies to construct their lines along highway. *Wade v. Tel. Co.*, 147—226.

Revisal, 2842, giving surety right to have execution against principal, is to be strictly construed. *Bank v. Hotel Co.*, 147—599.

Where breach of future contract occurred prior to enactment of ch. 538, laws of 1905, only so much of *Revisal*, 1689, applies as was embraced in ch. 221, laws 1889. *Burns v. Tomlinson*, 147—636.

Statute prescribing method of procedure to condemn lands or easements are to be strictly construed, and especially when right of eminent domain is conferred upon private corporation. *R. R. v. R. R.*, 148—63.

Statute should be construed so as to give it that meaning which is clearly expressed, and if there is doubt or ambiguity it should be construed so as to ascertain from its language the true intention of the

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legislature. *McLeod v. Comrs.*, 148—85.

See *Fortune v. Comrs.*, 140—322.

Revisal, secs. 2634 and 2644, imposing penalties against common carriers, are constitutional. *Iron Works v. R. R.*, 148—470.

See *Rollins v. R. R.*, 146—158; *Morris v. Express Co.*, 146—171.

Statute making trespass upon land barred in three years from original trespass, means trespass caused by structures permanent in their nature and made by companies in exercise of some quasi public franchise. *Sample v. Lbr. Co.*, 150—166.

When statutes give new and additional remedies for enforcement of rights and duties given or imposed by common law, unless a contrary intention is manifested, courts will not assume that legislature intended to enlarge or modify the common law right or duty. *Garrison v. R. R.*, 150—579.

It is a rule of construction that when words of general import are used and, immediately following and relating to the same subject, words of a particular or restricted import are found, the latter shall operate to limit and restrict the former. *Nance v. R. R.*, 149—371.

Statutes which restrict private rights of persons, or the use of property in which the public has no concern, should be strictly construed in favor of the citizen. *Ibid.*, 149—375.

Revisal, 1589, is a remedial statute, and in action for possession or to quiet title, not necessary to allege that defendant was in possession. *Land Co. v. Lange*, 150—30.

In proceeding to disbar an attorney for crime, the statute is confined to a conviction in this state. *In re Ebbs*, 150—51.

STATUTE OF DISTRIBUTIONS.

Where fund consists solely of personality and claimants are all in equal degree, the next of kin,

STATUTE OF FRAUDS.

distribution is per capita. *Ellis v. Harrison*, 140—444.

See *Executors and Administrators*.

STATUTE OF FRAUDS.

Generally.—Where defendant in a written contract to convey land, asked plaintiff for a year's postponement of option and within the year plaintiff tendered purchase price, specific performance lies and defendant is estopped from pleading statute of frauds. *Alston v. Connell*, 140—485.

Contract for sale of standing timber is within statute. *York v. Westall*, 143—281.

Agreement by defendant to withdraw all claim to standing trees and abandon all interest under an extension by parol of a written contract with plaintiff's grantor to cut timber, and plaintiff agreed to release all claim for damage for trespass, not within statute. *Ibid.*, 143—276.

Agreement made at time of conveyance of lot to defendant that if he did not build on lot but resold it, plaintiff was to have profits, may be shown by parol and does not come within statute. *Bourne v. Sherrill*, 143—381.

A deed to defendants in consideration of their paying vendor's debts, is not within statute. *Satterfield v. Kindley*, 144—460.

When plaintiff sues upon contract and defendant denies its existence, he can avail himself of statute without specially pleading it. *Winders v. Hill*, 144—614.

Where a contract, required to be in writing, is admitted in a letter, telegram or other writing, by the person to be charged therewith, the admission must contain internal evidence of the contract or refer to some writing that does. *Ibid.*, 144—618.

Parol and constructive trusts not within statute. *Russell v. Wade*, 146—124.

Where plaintiff conveyed land to defendant upon a consideration, and

STATUTE OF FRAUDS.

a parol agreement was had at time that plaintiff was to have half of profits if land was resold for a greater price, parol agreement is competent and not within statute. *Brown v. Hobbs*, 147—75.

While parol contract to convey land is void, law will grant relief against vendor, failing to make title to vendee, who has entered into possession, paid part of purchase price and put permanent improvements upon land, and will permit recovery of money paid as purchase price and value of improvements to extent of enhanced value, less reasonable rents and profits. *Ford v. Stroud*, 150—364.

Contracts for more than three years.—Verbal assignment of unexpired lease of land, to run for more than three years, is void. *Alexander v. Morris*, 145—22.

Must be pleaded.—When plaintiff sues upon contract and defendant denies its existence, he can avail himself of statute without specially pleading it. *Winders v. Hill*, 144—614.

Statute of frauds to be availed of as a defense must be pleaded. *Teal v. Templeton*, 149—34.

Promise to answer for debt of another.—If promisor orally assumes debt of another, who is discharged, statute does not apply. *Jenkins v. Holley*, 140—379.

If debt claimed is original debt of defendant, or if creditor in accepting promise of defendant, released a third person who was original debtor, statute does not apply. *Sheppard v. Newton*, 139—533.

A written promise by one to pay debt of others, that "he would pay their bill as soon as the dry kiln gets in operation," refers to an account stated and antecedent, and such is not enforceable for lack of a valuable consideration. *Supply Co. v. Finch*, 147—110.

Written memorandum.—Where agent of mortgagee made no note of sale, bidder acquires no enforceable right if statute is set up. *Dickerson v. Simmons*, 141—325.

STATUTE OF LIMITATIONS.

Advertisement of mortgage sale, with no written note showing price or purchaser, not a contract to convey. *Ibid*, 141—325.

Contract to sell growing trees or any interest in them must be written. *Ives v. R. R.*, 142—131.

Contract to cut and deliver cordwood, not within statute. *Ibid*, 142—131.

Letters addressed to a third party, stating and affirming a contract, may be used against writer as a memorandum of it. *Nicholson v. Dover*, 145—19.

Endorsement upon written assignment "we hereby transfer all our rights and title and interest in this lease," is sufficient. *Alexander v. Morris*, 145—22.

Growing trees are part of realty and contract to sell and convey them, or any interest concerning them, must be in writing. *Midyette v. Grubbs*, 145—88.

Where defendant agreed in writing to sell his land for given price, contract is binding on him though not signed by plaintiff. *Davis v. Martin*, 146—282.

To make a valid contract concerning land, not necessary for owner or principal to sign, but signature "thereto lawfully authorized," is sufficient, and in some cases though agent be acting for undisclosed principal. *Combes v. Adams*, 150—68.

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Generally.—Actions, both legal and equitable, covered by Code, 158. *McAden v. Palmer*, 140—258.

When no time specified for performance of an act or doing a thing, law implies that it may be done in reasonable time. *Winders v. Hill*, 141—694.

Statute authorizing service upon insurance commissioner, does not abrogate statute of limitations. *Green v. Ins. Co.*, 139—309.

Statute of limitations does not run in favor of nonresident individual or corporation. *Ibid*, 139—309.

STATUTE OF LIMITATIONS.

When trustee in active trust barred, cestui que trustent barred also. *Kirkman v. Holland*, 139—185.

Taxpayers in township are proper parties to bring mandamus to require expenditure of taxes as provided by statute, and there is no statute of limitations. *Jones v. Comrs.*, 143—60.

Laws of 1909, ch. 50, allowing party aggrieved within six months after change of road, or new road opened and completed, to apply for jury to assess damages, means that proceeding shall be begun "within," i. e., "not later than" six months. In re *Wittkowsky's Land*, 143—248.

Insurance company can not limit time within which action is to be brought less than a year, or bringing of new action after nonsuit to less than six months, and where nonsuit taken and it does not appear when, presumed that new action brought within time. *Parker v. Ins. Co.*, 143—345.

In absence of some statute, no limit upon time after testator's death within which will may be proven, and it then relates back to death of testator. *Steadman v. Steadman*, 143—345.

Statute of limitations is sufficiently pleaded for title under adverse possession when it appears by plain and reasonable intentment that defendants assert adverse possession for twenty years under known and visible lines. *Duckworth v. Duckworth*, 144—620.

Statute of limitations, when properly pleaded, will bar action for debt, securing balance of purchase price of land, so as to prevent any judgment in personam to be collected out of other property of debtor, but will not prevent appropriation of property held under bond till ten years from demand and refusal. *Worth v. Wrenn*, 144—662.

Statute of limitations applies to final, and not interlocutory judgments. *Williams v. McFadyen*, 145—158.

Where statute of limitations is

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pleaded, no reply to it is necessary. *Oldham v. Rieger*, 145—260.

If plaintiff in absence of agreement calculated to cause defendant to sleep on his rights, files no complaint and takes a nonsuit eighteen years later, counterclaim will be barred unless claimed in independent action brought in proper time. *Tomlinson v. Bennett*, 145—282.

Parol evidence is incompetent to show what would have been alleged in complaint which was never filed, in former action between same parties, so as to repel statute of limitations. *Ibid.*, 145—282.

If town permits steps to be built on street, so that it amounts to an actionable wrong, it can not be rendered lawful by lapse of time. *White v. New Bern*, 146—449.

Under facts in this case, enterer is barred by unreasonable delay. *Frazier v. Cherokee Indians*, 146—477.

In an action for wrongful killing of plaintiff's intestate, the words of the statute "to be brought within one year" is a condition annexed to cause of action, and not as a statute of limitation which must be pleaded, and before a prima facie case can be made out evidence tending to prove that action was commenced within one year after death must be offered. *Gulledge v. R. R.*, 147—235, and 148—569.

The docketing of a justice's judgment in the superior court becomes a judgment of that court only for purpose of creating a lien and having execution issued thereon, and an action brought on such judgment must be commenced within period limited on judgments of that court. *Oldham v. Rieger*, 148—550.

Too late after verdict to except for failure to submit issue upon statute of limitations, when no such issue was tendered. *Rich v. Morisey*, 149—45.

Nothing less than twenty years is an ouster between tenants in common. *Smith v. Smith*, 150—83.

When a statute shortens a limitation there must be a "reasonable time," notwithstanding the statute,

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in which to bring action. *Matthews v. Peterson*, 150—133.

Action by administrator appointed more than ten years after death of intestate, and over a year after passage of Revisal, 367, to subject land to payment of judgments, is barred. *Ibid*, 150—133.

Heirs at law can plead statute of limitations against administrator seeking to subject realty as fully as he could have pleaded it against a creditor. *Ibid*, 150—136.

Where administration was had more than ten years after death of intestate, but before Revisal went into effect, sec. 5454 does not apply. *Ibid*, 150—136.

Statute making trespass upon land barred in three years from original trespass, means trespass caused by structures permanent in their nature and made by companies in exercise of some quasi public franchise. *Sample v. Lbr. Co.*, 150—166.

Statute requiring actions to recover land sold for taxes to be brought within three years after execution of deed, does not apply to purchase made by mortgagee. *Cauley v. Sutton*, 150—330.

Requirement that protest be filed within ten days after posting of notice of entry, is mandatory. It is a condition annexed to right of protest, and not a statute of limitation. *Garrison v. Williams*, 150—677.

Begins to run.—Statute runs from discovery of facts constituting fraud; not from discovery by party of rights hitherto unknown to him. *Bonner v. Stotesbury*, 139—4.

Action for ponding water barred if substantial injury done prior to five years next before suit. *Stack v. R. R.*, 139—366.

In action by enterer of Cherokee lands, cause barred in ten years from registration of grant. *Frasler v. Gibson*, 140—272.

Five-year statute of limitations, Revisal, 394, applies only to railroads. *Cherry v. Canal Co.*, 140—422.

Upon execution sale of life tenant's interest, and subsequently by

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purchaser to him, seven years adverse possession would not run against remainderman till his death. *Norcum v. Savage*, 140—472.

Adverse possession against married woman could not be counted prior to 1899. *Ibid*, 140—472.

Where mortgagor has been in continuous possession since 1889, plaintiff must show some payment to bar running of statute. *Bunn v. Braswell*, 142—113.

Action to recover overcharge for mistake in deed, accrues from time fraud or mistake was known or should have been discovered by exercise of ordinary care. *Peacock v. Barnes*, 142—215.

Statute does not begin to run against the principal of a mortgage of lands until it is due, and power of sale contained in mortgage may be exercised within ten years after maturity of principal. *Scott v. Lbr. Co.*, 144—44.

Statute does not begin to run upon default in payment of annual interest upon the principal, when power of sale contained in mortgage is optional with mortgagee upon default of either interest or principal of debt. *Ibid*, 144—44.

Trustor's action for redemption under deed of trust accrues when trustee takes possession, and is barred in ten years thereafter, in absence of claim or demand. *Bernhardt v. Hagamon*, 144—526.

In action to enforce vendor's lien for unpaid purchase money where bond for title was given, statute begins to run when possession of vendee has become hostile. *Worth v. Wrenn*, 144—656.

Defendant's cause of action accrues upon registration of junior grant to plaintiff's grantor, and ten years statute runs from registration. *Johnston v. Lbr. Co.*, 144—717.

When trustees of active trust in remainder permit life tenant to be ousted by a stranger, statute begins to run against them from ouster. *Webb v. Borden*, 145—188.

In action for fraudulently obtaining deed for more timber than was

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intended to be conveyed, statute begins to run when plaintiff first discovered the facts, or by exercise of proper and reasonable care could have discovered them. *Modlin v. R. R.*, 145—220.

Action for money had and received is barred three years from breach of contract and not from receipt of money. *Tomlinson v. Bennett*, 145—281.

To arrest the running of statute, payment should be of such a nature and made in such a way as to imply that debtor acknowledged debt as still existing and promises directly and unequivocally to pay same. *Supply Co. v. Dowd*, 146—196.

Part payment takes a case out of the statute generally when payment was intended as an acknowledgement of the greater debt, but if it was not in the mind of the debtor to do this, the statute, having begun to run, will not be stopped by reason of such payment. *Ibid.*, 146—197.

Credit placed on account by creditor, without authority of debtor, is not a mutual account so as to put statute in motion only from last item. *Ibid.*, 146—198.

To make an account a continuing one from its commencement to its close, there must be mutual accounts between the parties, or an account of mutual dealings kept by one only, with knowledge and consent of other. *Ibid.*, 146—198.

Action to probate will in solemn form will be dismissed where petitioner had knowledge of probate of will in common form, qualification of executors for forty years, their removal from state and final account and settlement, to which she was a party. *In re Beauchamp*, 146—256.

Statute bars caveat to will in seven years, though petitioner be feme covert. *Ibid.*, 146—257.

Wrongful user by railroad, or its lessee, of easement for trackage or other uses alien to its rights, is not protected by any statute of

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limitations. *McCulloch v. R. R.*, 146—319.

Enterer upon State's vacant lands has an equity by virtue thereof and payment of purchase money, to call for deed and perfect his claim of legal title, and upon failure of him and those who claim under him to call for grant within ten years after entry, abandonment is presumed in favor of those who claim under junior grant. *Frazier v. Cherokee Indians*, 146—477.

In action to set aside sale, decree and deed made thereunder, by reason of fraudulent agreement to deprive plaintiffs' of their property, statute bars proceeding instituted three years after actual discovery of fraud. *Tuttle v. Tuttle*, 146—493.

Statute never runs against express trust until by some declaration or act of trustee an end is put to the relation of trustee and cestui que trust, and the latter is put to his action. *Greenleaf v. Land Co.*, 146—508.

See *Dixon v. Dixon*, 145—46.

Where one acquires title as trustee for another, statute began to run against him from time when he might be declared a trustee, or if trustee is barred, cestui que trust is also barred. *Sutton v. Jenkins*, 147—17.

Action for damage for unlawful use by railroad of a street amounting to a nuisance is limited to within three years prior to commencement of action. *Staton v. R. R.*, 147—448.

Statute does not begin to run against a married woman, in adverse possession of lands under color for required time, by ouster of a part thereof during her coverture, or, after her death, against her heirs during continuous adverse possession of husband as tenant by courtesy. *Hill v. Lane*, 149—272.

When railroad has acquired right of way, it may construct road across plaintiff's land, but it may

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not close up a ditch draining the land. It is liable for failure to make provision for water to flow under or through roadbed, and cause of action accrued from time substantial damage was sustained, and not from time roadbed was constructed. *Willis v. White*, 150—203.

See *Staton v. R. R.*, 147—441.

Where assignee of judgment knows that service has not been made on debtor, statute begins to run in favor of assignor of judgment, and this action is barred after three years. *Mfg. Co. v. Fertilizer Co.*, 150—418.

When there is at death remaining unexpired any part of time limited, but it will expire in less than "one year after the death," of the creditor, or in less than "one year after issuing letters on debtor's estate," such one year includes and is not added to, the unexpired statutory time. *Lowder v. Hathcock*, 150—440.

Must be pleaded.—Plea of statute of limitations cannot be raised by demurrer or motion to dismiss. *Oldham v. Rieger*, 145—258.

Where statute of limitations is pleaded in action to set aside sale, decree and deed for fraud, plaintiff should reply, setting out, by way of avoidance, the time when they aver the fraud was discovered, the burden being upon them to show facts to repel the statute. *Tuttle v. Tuttle*, 146—493.

Defense of statute of limitations is personal to defendant in interest and must be pleaded by him. *Hildebrand v. Vanderbilt*, 147—641.

Court in its discretion may allow amendment of pleadings, but not to set up a cause of action wholly different, and may restrict amended answer as to plea of statute of limitations. *Hockfield v. R. R.*, 150—421.

Nonresidents.—Statute does not run in favor of nonresident, but when plaintiff abandoned his policy for seven years, he is estopped

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by delay. *Brockenbrough v. Ins. Co.*, 145—355.

Statute does not run in favor of nonresident individual or corporation. *Green v. Ins. Co.*, 139—309.

Nonresident defendants cannot be deprived of protection of adverse possession, and statute of limitations by plaintiff's styling the proceeding an action to remove cloud from title. *Weaver v. Lone*, 146—417.

Promise not to plead.—If plaintiff was prevented from bringing his action during statutory period by conduct of defendant that makes it inequitable for him to plead the statute, or by agreement not to do so, he cannot defeat plaintiff's action by interposing the plea. *Tomlinson v. Bennett*, 145—281.

In action for assault, defendant's promise to investigate the matter and asking that no suit be brought, when made without reference to statute, is insufficient to keep statute from running. *Brown v. R. R.*, 147—218.

STATUTE OF USES.

Estate is conveyed to trustee for sole and separate use of a married woman and her heirs, and she becomes discoverer, necessity for preserving the separate estate being at an end, statute executes the use and she becomes absolute owner. *Cameron v. Hicks*, 141—21.

Where an estate is conveyed to trustee to preserve contingent remainders, statute will not execute the use. *Ibid*, 141—21.

Stenographic Notes.

See Appeal, rules of supreme court.

STOCK LAW.

Duty of railroad to construct cattle guards at point of entrance and exit from enclosed lands in towns, country, stock and non-stock law territory. *Shepard v. R. R.*, 140—391.

STOCK LAW.

Adoption of stock law does not abrogate in such locality general statute or rule of law. *Shepard v. R. R.*, 140—391.

Stock.

See Corporations, stock and stockholders; Railroads, cattle guards; Railroads, injuries to stock.

Stoppage in Transit.

See Carriers, rights and liabilities of consignor.

Streets.

See Roads and Streets; Highways; Negligence, defective streets; Municipal Corporations, street improvements.

STREET RAILWAYS.

Duty of one walking along or crossing street car track to keep a lookout and turn off when signalled. *Davis v. Traction Co.*, 141—134.

If street car is moving at lawful speed, and one enters upon track, defendant required to use ordinary care, give signals, lower speed, and if it appear reasonably necessary, stop car. *Ibid*, 141—134.

In action for injury to traveller crossing street car track, if car is properly equipped and equipment used with reasonable promptness and care, defendant not liable. *Ibid*, 141—134.

If street car is moving at speed in excess of that prescribed by ordinance, so that signals cannot be given nor appliances used, defendant liable for injury. *Ibid*, 141—134.

Speed in excess of that prescribed by ordinance, evidence of negligence. *Ibid*, 141—134.

Citizen and street car have, in common, right to use street, and rights of one to another stated. *Ibid*, 141—135.

Lumber roads and street railways are "railroads" within mean-

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ing of Fellow Servant Act. *Hemp-hill v. Lumber Co.*, 141—487.

Lessee of street railway who has assigned lease and cars and at time of injury to plaintiff was not operating road, not liable for negligence of assignee. *Dunn v. Ry.*, 141—521.

Meaning of term "street railways." *Ry. v. R. R.*, 142—424.

Electric cars should be provided with headlights, but whether it is negligence to run car at all in the dark when light is not burning must necessarily depend upon circumstances. *Briggs v. Traction Co.*, 147—393.

Alighting.—One who has indicated his desire to become a passenger on a street car, and who is in the act of boarding it when stationary at regular stopping place, is entitled to all rights of a passenger, and is not bound to prepare for or anticipate a sudden starting of car. *Snipes v. R. R.*, 144—18.

Conductor of street car not excused by his failure to see that all passengers are not safely on board, before giving signal to start. *Ibid*, 144—18.

Operation of.—Duty of one walking along or crossing street car track to keep a lookout and turn off when signalled. *Davis v. Traction Co.*, 141—134.

If car is moving at lawful speed and one enters upon track, defendant is required to exercise ordinary care, give signals, lower speed, and if reasonably necessary, stop car. If car is properly equipped and equipment is used with reasonable promptness and care, defendant is not liable. *Wright v. Mfg. Co.*, 147—537.

Riding on running board.—Passenger standing on platform and running board of street car, struck by rear end of ice wagon, nonsuit proper. *Hollingsworth v. Skelding*, 142—246.

See Railroads; Negligence.

SUBROGATION.

SUBROGATION.

Insurer against fire, who has paid loss sustained, subrogated to rights of insured, and can sue alone. *Cunningham v. R. R.*, 139—427.

Surety upon administrator's bond, called upon to pay devastation of principal, subrogated to rights of creditor. *Caviness v. Fidelity Co.*, 140—58.

Where purchase money paid by mistake has been used to satisfy debts of testator, subrogation does not arise. *Peacock v. Barnes*, 142—215.

Administrator who has purchased with his own funds a note and mortgage made by his intestate, may avail himself of security and collect from estate amount paid with interest. *Morton v. Lumber Co.*, 144—31.

When land is mortgaged and building thereon insured for mortgagee's benefit; second mortgage is given, with covenant for further insurance for benefit of second mortgagee's benefit, and when building burns and first mortgage is paid by sale of land, second mortgagee is subrogated to first mortgagee's right to insurance. *Fitts v. Grocery Co.*, 144—463.

If one legatee is paid more than his share and by some unforeseen cause for which executor is not responsible, it turns out upon final settlement that some legatees have been overpaid, after making good to other legatees their share, he may have relief in equity against the overpaid legatees. *Sprinkle v. Holton*, 146—264.

Subrogation is of equitable origin, not dependent upon contract and is always invoked to prevent injustice. It will never be permitted to work to prejudice of rights of others or produce injustice. *Moring v. Privott*, 146—564.

When security of holder of second mortgage is not impaired by release by the first mortgagee of a part of his security for an adequate consideration, and that fur-

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ther payment made to second mortgagee in ignorance and mistake, would be inequitable to purchaser, he may recover it from second mortgagee. *Ibid*, 146—564.

A mortgage debt, when paid by one in subrogation of rights of creditor, will operate either as a discharge or in the nature of an assignment of debt. *Ibid*, 146—565.

Upon payment by party secondarily liable for debt of creditor, he is substituted to all rights of latter as against party primarily liable, and may sue for debt as creditor could have done, without actual or legal assignment of it. *Fidelity Co. v. Grocery Co.*, 147—513.

See *Pittinger, ex parte*, 142—85; *Cunningham v. R. R.*, 139—436.

Subscription.

See Corporations, stocks and stockholders.

SUBSTITUTION.

Substitution of a deed for a will, by a confidential friend, is the grossest moral fraud. *Smith v. Moore*, 145—271.

See Payment.

Summary Proceedings.

See Ejectment; Claim and Delivery.

SUMMONS.

Generally.—Where summons in a special proceeding for partition is not in record, though otherwise regularly conducted, sale valid. *Rose v. Davis*, 140—266.

Summons is issued when clerk delivers it to sheriff for service, and his notation of the date on it controls as to when it was issued. *Smith v. Lumber Co.*, 142—26.

Service.—Decree obtained in State of plaintiff's domicile, personal service upon defendant within jurisdiction, valid both in rem and personam. *Bidwell v. Bidwell*, 139—402.

Local agent of foreign corpora-

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tion, who is? *Higgs v. Sperry*, 139—299.

Process may not be served on travelling auditor of foreign corporation, not doing business here. *Ibid*, 139—299.

Upon motion to dismiss for want of service, complaint not properly before the court. *Ibid*, 139—299.

Statute authorizing service upon insurance commissioner, does not abrogate statute of limitations. *Green v. Ins. Co.*, 139—309.

Recital in decree that "defendants were duly served," when owners of land subject to dower, were not made parties, has no effect. *Card v. Finch*, 142—140.

Action commenced by issue of summons, except where defendant is beyond reach of process, when it shall be commenced by filing affidavit and publication. *Grocery Co. v. Bag Co.*, 142—174.

Innocent purchaser will be protected where judgment regular upon its face, recites service of process. *Hatcher v. Faison*, 142—364.

Unauthorized appearance by counsel, where no summons served, will not put party in court and bind by judgment. *Ibid*, 142—364.

Though one is not served with summons, if he appeared either personally or by duly authorized attorney, this waives service. *Ibid*, 142—364.

In absence of any statement of facts, this court must presume that foreign insurance company was not licensed and that Rev. 4750 did not apply, but that summons was properly served under Rev. 440. *Parker v. Ins. Co.*, 143—339.

Caretaker of property of corporation, which was closing out, is not a process agent, though he sold two articles and applied proceeds to pay watchman. *Kelly v. Le-falver*, 144—4.

When policy issued prior to passage of Revisal 4803, and assigned to nonresident, statute does not apply and summons served upon insurance commissioner here, when

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defendant had previously withdrawn from state and cancelled its power of attorney, is insufficient. *Williams v. Life Assn.*, 145—128.

When a proceeding in rem or quasi in rem is instituted against a nonresident, personal service as authorized by Revisal 448 is sufficient. *Vick v. Flournoy*, 147—215.

In making personal service upon nonresident defendants, seal of issuing court should be affixed to summons, but when defendants have been actually notified of time and place to appear and purpose of action, lack of seal is not of substance. *Ibid*, 147—216.

To set aside judgment for irregularity, for lack of proper service of summons, court should find facts and correct the record to speak the truth, and if there was no service or appearance by defendant, judgment is void. *Simmons v. Box Co.*, 148—345.

Foreman of mill, acting under directions of superintendent, who has authority to hire and discharge employees, but not to receive money, is not an "officer" or "managing or local agent," upon whom valid service of summons could be made. *Ibid*, 148—346.

By entering general appearance and demurring, nonresident defendant of the county waives the defect of proceedings against him in justice's court for want of service of summons ten days before trial, and judgment against him was not void but irregular, or at most voidable. *Laney v. Hutton*, 149—266.

Service on wrong person.—Where process is served on one having same name as defendant, but real defendant in fact is not served and enters no appearance, judgment against him is void. *Flowers v. King*, 145—235.

SUNDAY.

Sunday is to be counted in reckoning time for shipment, when it is not the last day, though freight

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trains are forbad to run on that day. *Davis v. R. R.*, 145—211.

See *Watson v. R. R.*, 145—241.

Verdict rendered on Sunday is valid. *Tuttle v. Tuttle*, 146—493.

Supersedeas.

See Appeal; Bonds.

Supplemental Proceedings.

See Execution, supplemental proceedings.

SUPPORT.

Father is under natural obligation to support his illegitimate offspring, and maintain mother in her sickness. *Burton v. Belvin*, 142—153.

See Parent and Child; Husband and Wife; Married Women, contracts of.

Supreme Court.

See Appeal; Court, discretion of, supreme; Petition to Rehear.

Surety.

See Principal and Surety.

Surety Companies.

See Principal and Surety; Bonds.

SURFACE WATER.

Lower proprietor must receive surface water which falls on adjoining higher lands and naturally flows therefrom. Owner of upper land may accelerate the flow, but not divert it. *Greenwood v. R. R.*, 144—448.

See Rivers and Streams.

Surgeons.

See Evidence, expert.

Surprise.

See Excusable Neglect.

SURVEY.

An entry void for uncertainty may be made certain and definite by subsequent survey, and grant

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based upon it will be valid. *Lovins v. Carver*, 150—711.

See Evidence, maps; Deeds, grants.

SWAMP LANDS.

Board of education, by virtue of statute, acquires title to swamp lands. *Board of Education v. Makely*, 139—34.

Where one claims swamp lands, and another claims under special grant, donee must show that his grant is for land within particular description. *Ibid*, 139—37.

TACKING.

Possession cannot be tacked to make title by prescription, when deed under which last occupant claims title does not include land in dispute. *Jennings v. White*, 139—22.

If deed under which plaintiff claims covers disputed land, although his grantor had no title, he could tack his possession with that of grantor and build up title based upon disseisin, *Ibid*, 139—22.

Mortgagee has no right to tack unsecured debt to mortgage debt and demand both as condition to redemption. *Rich v. Morisey*, 149—48.

Talesman.

See Jury, challenges.

Tariff.

See Carriers, discriminations; Freight Rates; Railroads, delayed shipments and refusal to receive; Telephone Company, rates.

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Officer of foreign corporation coming here to hire hands for employment by himself, not immigrant agent. *Lane v. Comrs.*, 139—443.

Working the roads is a necessary expense and county commissioners may levy a tax for such purpose without a vote of the people. *Crocker v. Moore*, 140—430.

Constitution, Art. V, sec. 2, applies to levy of taxes for general,

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not special purposes. *Crocker v. Moore*, 140—430.

Legislature cannot confer upon private corporations power to tax, though it may doubtless create municipal corporations for that especial purpose when not forbidden by constitution to do so. *Smith v. School Trustees*, 141—151.

Act creating graded school district and authorizing trustees to levy tax and issue bonds when act approved by majority of qualified voters, valid exercise of legislative authority. *Ibid*, 141—143.

Statute requiring public roads to be worked by labor, constitutional. No constitutional prohibition against double taxation. *State v. Wheeler*, 141—773.

Time is not money, nor is labor property in the sense that it can be liable to property tax. *Ibid*, 141—773.

Where certain townships by extra taxation procure building of railroad, legislature may direct commissioners to use in those townships county taxes derived from such railroad property until amount so used in said townships shall fully reimburse them for amount paid out to aid in building railroad. *Jones v. Comrs.*, 143—59.

No constitutional requirement that tax rate for county purposes shall be same everywhere. *Jones v. Comrs.*, 143—59.

Under town ordinance imposing separate tax upon different classes of saw-mill property connected by steam pipes, each is subject to its appropriate tax, though owned and operated by same corporation. *Washington v. Lumber Co.*, 145—13.

A tax is uniform when it is equal upon all persons belonging to the described class upon which it is imposed. *R. R. v. Newbern*, 147—167.

While by some sections of act town may be restricted in its tax levy for ordinary purposes, various

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sections of act relating to subject must be construed together. *Swinson v. Mt. Olive*, 147—612.

Revisal 4112, providing for levy of extra tax, above that collected by state for school purposes, is valid, though exceeding limitation of Article V. Any tax beyond this is void. *Collie v. Comrs.*, 145—170.

When county has used its taxes towards a four months school, and margin left is insufficient to defray necessary county expenses, taxes for that purpose, without vote of people, by consent of legislature, are valid. *Ibid*, 145—188.

Taxes upon valid bonds can be levied up to the constitutional limitation to pay interest as it falls due, and principal at maturity. *Comrs. v. MacDonald*, 148—126.

Where bonds are issued by county by popular vote, under legislative authority, which does not provide for levy to exceed constitutional limitation for principal, interest or sinking fund, tax cannot be levied to exceed the restriction. *Ibid*, 148—126.

Constitution, Art. VII, sec. 7, prescribing limitations upon counties in contraction of debts for other than necessary expenses, should be construed in relation to each other, and special tax authorized and voted for is not unconstitutional by reason of increase of property tax over constitutional equation between property and poll tax. *R. R. v. Coms.*, 148—234.

No more should be taken from the citizen, either natural or corporate, by way of taxation than is reasonably necessary, and what is taken must be applied to the purpose for which it is so taken, and "no other." *Ibid*, 148—247.

Court, at suit of taxpayer, will not enjoin tax levy made by commissioners for that they did not wisely exercise their discretion in fixing greater rate of taxation on \$100 worth of property than was necessary for paying interest on special debt, when practically all

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other taxpayers have paid tax in pursuance of levy and statutory limit has not been exceeded. *Ibid*, 148—246.

Collection of tax for specific purpose cannot be applied to general purposes, and any taxation beyond reasonable necessity or for any other purpose than that for which it is levied, is oppression. *Ibid*, 148—251.

Limitation imposed upon cities in creating bonded indebtedness is by statute, Revisal 2977, and not a constitutional one. The limitation may be repealed by legislature in toto, or except any particular municipality from its operation. *Wharton v. Greensboro*, 149—63.

Assessment and listing.—Placing personal property on tax list and adding back taxes, has effect of a judgment, but assessment is invalid where owner is given no hearing before assessors or an opportunity to be heard in court, and permanent injunction against proceeding by sheriff to sell, is proper. *Lbr. Co. v. Smith*, 146—202.

Legislature may provide for listing and assessing personal property omitted from list, but taxpayer must have notice and opportunity to be heard before assessors or the courts, before assessment is conclusive. *Ibid*, 146—199.

Revisal 5290 providing for assessment of railroad property by corporation commission, is upon an ad valorem basis and is not in conflict with Art. V, sec. 3 of the constitution. *R. R. v. Newbern*, 147—166.

It is presumed that railroad has acquired the right of way authorized by its charter, when road was built in 1858, and it has always used 100 feet on either side of center of track, and this right of way is taxable by corporation commission. *Ibid*, 147—168.

Collection of.—Sheriff is proper party defendant in action to restrain collection of back taxes, but commissioners may make them-

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themselves parties if they desire. *Lbr. Co. v. Smith*, 146—199.

Injunction is appropriate remedy for avoiding enforcement of illegal or unconstitutional tax. *R. R. v. Coms.*, 148—225.

Mandamus to compel collection of sufficient poll tax under constitution, is proper remedy in action by taxpayer contending that tax levied does not observe constitutional equation between poll and property tax. *Ibid*, 148—225.

Collection of entire tax levy will not be enjoined if the portion conceded to be valid can be separated from portion in controversy. *Ibid*, 148—225.

Poll.—Constitutional provision that State and county capitation tax combined shall never exceed \$2 on the head, is imperative and prohibits the levy of any tax upon the poll for any purpose in excess of that sum. *R. R. v. Coms.*, 148—245.

Taxes in excess of \$2 on poll may be levied for purpose of special school district, when submitted to and approved by qualified voters in election duly held, and equation between property and poll tax in Art. V, sec. 1 of constitution applies only to State and county taxation. *Perry v. Coms.*, 148—526.

Art. VI, sec. 4 of constitution depriving one of right to vote unless he has paid his poll tax for previous year, refers to poll tax prescribed by Art. V, sec. 1, and is in no way affected by any increase of taxation imposed on special tax districts. *Ibid*, 148—528.

Solvent credits.—Defense that bond sued on was not listed for taxation, should be pleaded in answer. *Martin v. Knight*, 147—567.

Failure to list solvent credits is not an absolute bar to recovery, but no judgment can be had till they be listed and taxes paid thereon. *Ibid*, 147—568.

Proper to refuse tax list as evidence that solvent credit sued on was not listed. *Ibid*, 147—581.

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Special assessment.—In exercising power of levying special assessments, aldermen must lay off and define limits of the districts within which they are to be made, and all such property shall bear its proportion of cost upon basis of special benefits. *Asheville v. Trust Co.*, 143—360.

Before final order or judgment, fixing amount to be paid by owner, is made, cost of improvement should be ascertained and apportioned between several pieces of property. *Ibid*, 143—360.

Legislature in exercise of right of taxation, may direct the whole, or such part as it may prescribe, of expense of a public improvement, such as establishing, widening, grading or repair of a street, to be assessed upon owners of land thereby benefited. *Ibid*, 143—366.

If the legislature has fixed the district and laid the special tax for the reason that, in the opinion of the legislative body, such district is peculiarly benefited, its action must in general be deemed conclusive. *Ibid*, 143—370.

Taxes in excess of \$2 on poll may be levied for purpose of special school district, when submitted to and approved by qualified voters in election duly held, and equation between property and poll tax in Art. 5, sec. 1 of constitution applies only to State and county taxation. *Perry v. Coms.*, 148—526.

As a general rule the assessment of adjoining property by a city for paving streets and sidewalks by front foot rule will be upheld; but where in applying this rule there is a marked disproportion between burden imposed and any possible benefit, so that principle of equality has been ignored, court may interfere and afford relief. *Kinston v. Wooten*, 150—300.

In action to declare assessment upon property for sidewalk and street improvements upon the front foot rule, and to enforce lien by a sale of property, court should hear defendant's evidence, and assess-

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ment of \$447 on lot valued at \$1,500 is not excessive. *Ibid*, 150—302.

TAX LIST.

As evidence.—Tax list, showing assessed valuation of land, is incompetent in action for burning timber. *Hamilton v. Railroad*, 150—193.

TELEPHONE AND TELEGRAPH COMPANIES.

Where goods ordered by telegram failed to arrive, not sufficient evidence upon liability of defendant to show that sendee had sold plaintiff goods on credit before and since sending of message. *Newsome v. Tel. Co.*, 144—178.

When operator received a message, with money to pay charges of transmission, and fails to send it, a wrong is committed to plaintiff which gave her a cause of action and entitled her to at least nominal damages, whether there was a breach of contract or tort. *Hocutt v. Tel. Co.*, 147—189.

When a properly addressed message and proper charges for transmission are tendered, the duty devolves upon defendant to send and deliver the message to addressee, unless it had some legal excuse for not doing so. *Ibid*, 147—190.

Delayed messages.—Compensatory damages allowed addressee for wrongful failure to deliver telegram. *Davis v. Tel. Co.*, 139—78.

Not necessary that claimant be very near relative to recover for negligent transmission of telegram. *Ibid*, 139—78.

Not necessary that telegram announce sickness, but grievance complained of should amount to high degree of mental suffering, not regret. *Ibid*, 139—78.

Complaint sufficient in action for failure to deliver telegram. *Hall v. Tel. Co.*, 139—369.

Delay of twenty-eight hours in delivery of telegram announcing illness of wife, some evidence of

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mental anxiety. *Hamrick v. Tel. Co.*, 140—151.

Prima facie case of negligence made out for failure to promptly deliver death message. *Alexander v. Tel. Co.*, 141—75.

Where complaint alleged delivery of telegram "after 8 a. m.," evidence of its subsequent delivery, competent. *Ibid*, 141—75.

Testimony of one who heard plaintiff's father, just before he died, express his desire to see plaintiff before he died, competent on question of damages, for delayed telegram. *Whitten v. Tel. Co.*, 141—361.

Failure to notify sender of a telegram of its non-delivery, evidence of negligence. *Carter v. Tel. Co.*, 141—374.

Law exacts greater diligence in transmission and delivery of telegram relating to sickness. *Kernodle v. Tel. Co.*, 141—436.

Error for court to decide as matter of law that delay in delivery of telegram 17 minutes after receipt, was unreasonable. *Ibid*, 141—436.

Plaintiff must show negligence in delivery and this caused mental suffering, and where he could not have reached home earlier had there been no delay, he cannot recover. *Ibid*, 141—437.

What plaintiff would have done had it been promptly delivered, question for jury. *Ibid*, 141—437.

See *Carter v. Tel. Co.*, 141—376.

Action for delayed delivery of message stating wife's illness, husband's delay in reaching her and mental anguish in consequence, should be submitted to jury. *Gerrock v. Tel. Co.*, 142—22.

Telegraph company who gives message to plaintiff's son, at its office, who had come on wheel, with request to deliver to his father, made him its agent and is responsible for delays of its messenger. *Mott v. Tel. Co.*, 142—532.

Duty of telegraph company who knows where plaintiff lives, to deliver messages promptly whether extra charges for delivery beyond

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free delivery limits are paid or not. *Ibid*, 142—532.

Jury should not consider, as excuse for delayed message, any time consumed by agent at receiving office in attending to his duties as railroad agent or in handling mail. *Ibid*, 142—532.

To recover substantial damages it is necessary to show that defendant could reasonably have foreseen from face of message, or extraneous information, that damage would result from breach of duty. *Harrison v. Tel. Co.*, 143—147.

Evidence that husband of feme plaintiff told messenger who, about four hours afterwards, delivered the message, that he was expecting a death message and to bring it out to his wife, is competent upon question of negligent delay. *Bailey v. Tel. Co.*, 150—317.

When there has been a negligent delay in delivery of death message, it was not incumbent upon plaintiff, as a matter of law, to drive several miles across the country so as to reach funeral in time and cure defendant's neglect. At most, failure to do so, if practicable, would be in mitigation of damages. *Ibid*, 150—317.

If defendant failed to exercise ordinary care in attempting to deliver death message, and if by exercise of such care message could have been delivered in time for plaintiff to have reached his home and attended funeral of his father, there was negligence. *Willis v. Tel. Co.*, 150—324.

It is not sufficient that defendant was negligent, but its negligence must have been the proximate cause of the injury. *Hauser v. Tel. Co.*, 150—558.

Where night message announcing serious illness of plaintiff's niece, was filed Saturday night at 8 o'clock, and was not delivered till Monday morning at 9 o'clock, this was gross negligence. *Pierson v. Tel. Co.*, 150—561.

Charge that "the message not having been delivered until a week

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afterwards, law presumes negligence on part of defendant company, but it is not such a presumption as could not be rebutted," correct, but that which follows, erroneous. *Shepard v. Tel. Co.*, 143—244.

Jury have no right to take into consideration their own feelings. *Ibid.*, 143—244.

Competent for plaintiff to testify that he was greatly grieved because he was unable to attend father's deathbed and funeral. *Ibid.*, 143—244.

Fact that mental anguish is presumed where close relationship exists does not exclude more direct proof by plaintiff's own testimony. *Ibid.*, 143—244.

One not mentioned in message or whose interest therein is not communicated to company cannot recover substantial damages for mental anguish. *Helms v. Tel. Co.*, 143—386.

Liability of telegraph company for mental anguish for negligent transmission of message from this State to office in another for delivery, is determined by laws of State in which message was received for transmission. *Johnson v. Tel. Co.*, 144—410.

When there is evidence of negligence of a telegraph company prior to time of delivery of telegram to party in whose care it was sent, nominal damages at least recoverable. *Gerock v. Tel. Co.*, 147—7.

In action by wife on delayed message to her husband announcing her sickness, she is entitled to recover for damages proximately caused by defendant's negligence, even though husband had inquired of her father as to her condition. *Ibid.*, 147—7.

Judge's charge, in action upon delayed message, approved. *Ibid.*, 147—5.

If defendant was negligent, and plaintiff could have taken a train and arrived in time for funeral of his father, and made no effort to do so, this was proximate cause of

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injury. *Edwards v. Tel. Co.*, 147—130.

Refusal to charge upon time for receipt, sending and delivery of message is proper. *Ibid.*, 147—129.

One cannot recover damages on account of delayed message, where he saw his brother's body after decomposition had advanced so far that his features could hardly be recognized. *Woods v. Tel. Co.*, 148—8.

Damages for mental anguish may be recovered in State where message is sent, although it is to be delivered in a State which does not allow a recovery of such damages, but if both States from and to which message is sent refuse to allow damages for mental suffering, such damages cannot be recovered in suit brought in another State which does allow such damages, and is one through which the company has a line. *Ibid.*, 148—8.

If telegraph company receives a message from sender and undertakes to deliver it to addressee at time not within its office hours, it is its legal duty to do so. *Suttle v. Tel. Co.*, 148—482.

Telegraph company must be notified in some way that mental anguish will naturally and reasonably follow as a result of its negligence, either by information contained in the message itself or facts within its knowledge at the time, or brought to its attention at time of receipt of message. *Ibid.*, 148—483.

In action by husband and wife on delayed death message sent to husband, fact that wife was sister of decedent will not entitle her to judgment in absence of evidence and finding that message was sent to wife, or for her benefit. *Holler v. Tel. Co.*, 149—341.

Mother may testify that she had child buried on day it died, and in absence of father, on account of disease from which child died, and on advice of physician. *Cordell v. Tel. Co.*, 149—414.

It is not for defendant to say that its operator did not anticipate

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that his refusal to receive and transmit message would cause plaintiff mental anguish. Every man in law is presumed to intend any consequence which naturally flows from an unlawful act, and is answerable to private individuals for any injury so sustained. *Ibid*, 149—413.

It is a reasonable requirement that operator should aid ignorant sender to put message in proper form, so as to express his meaning, and it is no excuse for failure to receive the message, such as in this case, when it was not signed. *Ibid*, 149—411.

No presumption of mental anguish on account of delayed message, growing out of relation of stepmother and son, but is a fact that plaintiff may prove if she can. *Harrison v. Tel. Co.*, 143—148.

Evidence that plaintiff had no child of her own, that she raised deceased from small boy, that he treated her with affection and called her mother, etc., is evidence that she suffered more than disappointment, and is question for jury. *Ibid*, 143—148.

Where telegram announcing death of plaintiff's niece, with whom he had lived in his brother's home, character of message put defendant upon notice of its importance, and question of mental anguish endured is for jury. *Pierson v. Tel. Co.*, 150—561.

Stipulation that claim for non-delivery of message must be presented within 60 days after plaintiff has knowledge of delay, is valid, and bars action brought thereafter. *Sykes v. Tel. Co.*, 150—432.

Delivery of message.—Delivery of a telegram to one in whose care sendee is addressed is, in law, a delivery to sendee. *Gerock v. Tel. Co.*, 147—8.

When prior negligence of telegraph company is shown, which may cause an injury, it should notify the one in whose hands the message was sent of its importance, or it should be left open for jury

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whether employee acted as a man of ordinary prudence. *Ibid*, 147—9.

In action on delayed death message, where sendee lived in country, which fact agent knew, if he was unwilling to undertake a delivery, trusting to plaintiff to pay the cost, he should at once have sent a service message asking if costs were guaranteed. *Edwards v. Tel. Co.*, 147—131.

When message is accepted for delivery to addressee and company fails to deliver it, it becomes *prima facie* liable and burden rests upon it to show such facts as will excuse its failure. *Woods v. Tel. Co.*, 148—5.

Misdirection of sendee's address does not relieve telegraph company of duty to attempt to deliver message. It should make reasonable inquiry and exercise that degree of care which a prudent person would use to deliver the message. *Ibid*, 148—6.

If due search for sendee of message has been made and he could not be found, company is still required to wire back for better address, and failure to do this is evidence of negligence. *Ibid*, 148—6.

Duty to receive message.—When one presents message at telegraph office during office hours, to which there is no lawful objection, and pays or tenders usual charges therefor, it is duty of operator to receive and promptly transmit it, and refusal to do so without legal excuse is actionable. *Cordell v. Tel. Co.*, 149—408.

It is a reasonable requirement that operator should aid ignorant sender to put message in proper form, so as to express his meaning, and it is no excuse for failure to receive the message, such as in this case, when it was not signed. *Ibid*, 149—411.

Notice of claim.—Stipulation that claim for non-delivery of message must be presented within 60 days after plaintiff has knowledge of delay, is valid, and bars action

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brought thereafter. *Sykes v. Tel. Co.*, 150—432.

Office hours.—Telegraph company has right to fix reasonable hours for its offices to remain open, and it waives this right if it undertakes to deliver message at other than office hours. *Carter v. Tel. Co.*, 141—374.

See *Suttle v. Tel. Co.*, 148—482.

Rates.—Persons having connecting offices and partners as to some but not as to all matters are entitled to rate charged by telephone company for service to partnership. *Manning v. Tel. Co.*, 147—298.

Error in Transmission.—In action for damages on account of message ordering "four gallons of corn," sender's name being erroneously transmitted, plaintiff must show that sendee was deceived by error and that he understood that corn whiskey was intended. *Newsome v. Tel. Co.*, 144—178.

Tenant.

See *Landlord and Tenant*.

Tenant by Courtesy.

See *Husband and Wife*.

TENANT AT SUFFERANCE.

Mortgagor in possession, after default, is tenant by sufferance and may be ejected by mortgagee at any time, without notice. *Bunn v. Braswell*, 139—135.

TENANT IN COMMON.

Deed to S. and wife A. and their heirs, including former children of A. by another husband," tenants in common. *Darden v. Timberlake*, 139—181.

Child en ventre sa mere, when deed executed, takes in common with living children. *Campbell v. Everhart*, 139—502.

Tenants in common may join in one action, yet when thus joined they recover in accordance with their several rights. *Cameron v. Hicks*, 141—37.

TENANT IN COMMON.

No legal partition can be made between tenants in common without deed, and doctrine of part performance insufficient to prevent operation of statute. *Rhea v. Craig*, 141—602.

No action lies for one tenant in common or joint owner of personal property to recover its exclusive possession except when property destroyed carried out of State, or of perishable nature. *Thompson v. Silverthorne*, 142—12.

Injunction and receivership lie to prevent threatened destruction or removal of property, pending proceeding for partition. *Thompson v. Silverthorne*, 142—13.

Where there are two grantees of State's vacant land, they are tenants in common and both hold possession by those in possession of the land put there by one of them, whether one tenant in common be a resident or not. *Weaver v. Love*, 146—415.

Possession of one tenant in common is possession of both. *Ibid*, 146—416.

Husband of one of the heirs at law, having qualified as administrator and entered upon the lands of his intestate, legally holds possession as agent for the heirs at law, though there is evidence that he entered thereupon in the right of his wife as a co-tenant. *Mott v. Land Co.*, 146—526.

Unity of possession being the only unity essential to a tenancy in common, anything that operates to destroy this unity will dissolve the co-tenancy. *Sutton v. Jenkins*, 147—16.

When mortgaged land is conveyed to brother and sister, mortgage is bought in by their father, and upon foreclosure sale by commissioner, father purchases and conveys reversion to his son, he is not thereby estopped to claim title. *Ibid*, 147—15.

One under a legal or moral obligation to pay taxes cannot by neglecting to pay same, and allowing land to be sold in consequence of

TENANT IN COMMON.

such neglect, add to or strengthen his title by purchasing at sale himself or by subsequently buying from a stranger who purchased at sale. *Smith v. Smith*, 150—83.

Entry of one tenant in common enures to benefit of co-tenant. *Dobbin v. Dobbin*, 141—210.

Actual ouster by one tenant in common evidenced by clear, positive and unequivocal act, followed by possession for requisite time, bars co-tenant. *Ibid*, 141—210.

See *Smith v. Smith*, 150—83; *Church v. Bragaw*, 144—126.

Interest of co-tenant.—Generally, one co-tenant cannot purchase an outstanding title or encumbrance affecting the common estate for his own exclusive benefit and assert such right against his co-tenants, but one co-tenant may purchase his co-tenant's share of common property under execution sale; or entire property at sale to pay common ancestor's debt. *Jackson v. Baird*, 148—30.

TENDER.

Tender of unpaid balance due on stock, before sale, subsequent sale void. *Wilson v. Tel. Co.*, 139—395.

Where stock wrongfully sold after legal tender of amount due, mandamus proper for issue of new stock upon payment of balance due. *Ibid*, 139—395.

Unconditional tender on day mortgage debt falls due, discharges lien of mortgage, though debt survives as personal liability. *Dickerson v. Simmons*, 141—325.

Unaccepted tender, without suit to redeem, stops interest and costs, but lien of mortgage still subsists. *Ibid*, 141—325.

TESTATOR.

Intention of.—Real intention of testator must have effect. *Wilkins v. Norman*, 139—43.

Where testator employs words having well known legal meaning,

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he is deemed to have used them in such sense. *Ibid*, 139—43.

See *Wills*, construed.

TIMBER DEEDS.

Growing timber part of realty; deeds and contracts concerning it governed by laws applicable to land. *Hawkins v. Lumber Co.*, 139—160.

See *Ives v. R. R.*, 142—131; *York v. Westall*, 143—281; *Midyette v. Grubbs*, 145—88; *Tremaine v. Williams*, 144—114.

Upon expiration of time limit for cutting timber, that part not cut and removed reverts to vendor. *Hawkins v. Lumber Co.*, 139—163.

Grantee in deed, in which wife does not join, cannot cut timber. *Bynum v. Wicker*, 141—95.

Deed conveying timber of certain size "at base when cut," includes all trees of that diameter when actually cut. *Banks v. Lumber Co.*, 142—49.

Contract to cut and deliver cordwood, not within statute of frauds. *Ibid*, 142—131.

Agreement by defendant to withdraw all claim to standing trees and abandon all interest under an extension by parol of a written contract with plaintiff's grantor to cut timber, and plaintiff agreed to release all claim for damage for trespass, not within Statute of Frauds. *Ibid*, 143—276.

When a timber contract allows the cutting of trees which measure twelve inches "when cut," it is error in court below to hold that defendant could cut trees that would grow to twelve inches within time limit. *Isler v. Lumber Co.*, 146—557.

When the contract for sale of standing timber did not specify when the diameter should be measured, purchaser could cut only such trees as had attained the prescribed diameter at date of contract. *Ibid*, 146—557.

Vendee in timber contract has right to cut any trees which at any time during its term, should

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have actually reached the stipulated size, but not before. *Ibid*, 146—557.

Executory contract made by owner of land with another to cut timber on a certain place, is a contract of personal employment, and vests no interest in the land or standing timber in the employee. *Biggers v. Matthews*, 147—301.

Where owner of land employed one to cut standing timber and before contract was completed land was sold to another, original owner is liable for compensatory damages, and purchaser takes land free from any right or claim on account of cutting of timber. *Ibid*, 147—301.

Deed conveying timber of given size, and granting four years in which to cut, haul and remove, and provision made for extension of time upon payment of interest, the extension refers to the right to "cut" as well as "remove" the timber. *Lumber Co. v. Smith*, 150—255.

Estate conveyed.—Upon death of intestate, his interest in timber deeds devolved upon his heir, subject to right of dower in his widow. *Midyette v. Grubbs*, 145—92.

Contract to cut timber of given size on certain land, for fixed period, passes present estate in timber defeasible as to all timber not cut within time limit. *Lumber Co. v. Corey*, 142—462.

Time limited.—Contract to cut timber of given size on certain land, for fixed period, passes present estate in timber defeasible as to all timber not cut within time limit. *Lumber Co. v. Corey*, 140—462.

Contract to sell growing trees valid though signed only by vendor. *Ibid*, 140—462.

"All pine timber, etc." of given size, in contract, means timber that size by measurement when trees are reached in process of cutting. *Ibid*, 140—462.

Injunction will not lie to restrain cutting of certain trees

TIME.

when no time limit is fixed. *Woody v. Timber Co.*, 141—472.

Whether right to cut timber is a grant or reservation, it expires at time specified. When no time specified, grantee upon implied agreement to cut and remove within reasonable time. *Mining Co. v. Cotton Mills*, 143—307.

When a grantor of the fee reserves or excepts the timber, he is not providing for timber-cutting, but reserving a right, and should be entitled to hold till this is put an end to by the grantee giving notice for reasonable time so that grantor may elect to cut or sell this right to another. *Ibid*, 143—308.

Where timber contract allows grantee to remove timber "at any time within four years from date," he must at least begin to cut and remove during that time or he forfeits his right. *Lumber Co. v. Smith*, 146—160.

Where timber deed gave grantee the right to enter upon lands and cut and remove timber within five years, and that land should not be cut over for timber a second time, a base or qualified fee was granted and this second clause was not repugnant. *Davis v. Frazier*, 150—452.

Wrongful cutting.—Defendant claiming title to timber by mesne conveyance from plaintiff, is estopped to deny plaintiff's title to lands in action for damages for cutting timber of other kinds than conveyances specify. *Smith v. Lumber Co.*, 150—41.

In action for damages for cutting of timber not authorized by deed, and where defendant offered no evidence, plaintiff's evidence made a prima facie case, and whether wrongful cutting was done by defendant or independent contractor, was for jury. *Ibid*, 150—41.

TIME.

Unconditional tender on day mortgage debt falls due, discharged lien of mortgage, though debt sur-

TIME.

vives as personal liability. *Dickerson v. Simmons*, 141—325.

When no time specified for performance of an act or doing a thing, law implies that it may be done in reasonable time. *Winders v. Hill*, 141—694.

Where a statute shortens a limitation there must be a "reasonable time," notwithstanding the statute, in which to bring action. *Matthews v. Peterson*, 150—133.

In construing time when land entered shall be paid for, the Act begins from the year of entry and not the day. *Barker v. Denton*, 150—725.

See Appeal; Statute of Limitations.

In computing time for transportation of freight, Sundays are included. *Watson v. R. R.*, 145—241.

See *Davis v. R. R.*, 145—211.

In construing time when land entered shall be paid for, the Act begins from the year of entry and not the day. *Barker v. Denton*, 150—725.

TITLE.

Subsequently acquired outstanding title enures to grantee in deed of bargain and sale. Contra as to quitclaim. *Weeks v. Wilkins*, 139—215.

Quitclaim deed, containing no covenants, vests in grantee only such title as grantor was seized of then. *Ibid*, 139—215.

Purchaser of note without endorsement, only gets right which payee has. *Tyson v. Joyner*, 139—69.

Possession cannot be tacked to make title by prescription, when deed under which last occupant claims title does not include land in dispute. *Jennings v. White*, 139—22.

If deed under which plaintiff claims covers disputed land, although his grantor had no title, he could tack his possession with that of grantor and build up title based upon disseisin. *Ibid*, 139—22.

To make disseisin effectual to give title, must appear that latter

TITLE.

holds estate under first disseisor. *Ibid*, 139—22.

Where one has deed conveying no title, enters upon and claims land as his own, possession is adverse. *Kirkman v. Holland*, 139—185.

Title not in issue in processioning proceeding. *Hill v. Dalton*, 140—9.

Where swamp land vested in plaintiff, instruction that jury must be satisfied by greater weight of evidence that land described in complaint is swamp land, before they could find for plaintiff, was proper. *Board of Education v. Makely*, 139—30.

Adverse possession, which will ripen a defective title, must be of character to subject occupant to action. *Smith v. Proctor*, 139—314.

Plaintiff in ejectment must show good title against the world, or good against defendant by estoppel. *Campbell v. Everhart*, 139—502.

Plaintiff in ejectment makes out prima facie title, when. *Ibid*, 139—502.

If plaintiff sets out a specific chain of title, his evidence will be confined to title as alleged; and while it is not necessary to aver evidences of plaintiff's title, yet, if these be alleged, the substantial elements of the title must be stated. *McCollum v. Chisholm*, 146—23.

When plaintiff satisfies court his claim is bona fide and shows apparent title to timber, injunction should continue till title determined. *Moore v. Fowle*, 139—51.

Title of grantee under deed in escrow is a legal one, especially so if deed rightfully delivered to him. *Craddock v. Barnes*, 142—90.

Title to property passes, where defendant without knowledge of insolvency and within four months prior to bankruptcy, received cross-ties and paid present consideration. *Weeks v. Spooner*, 142—479.

When there is a mixed possession by several persons, law ad-

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judges legal seisin to be in him who has the title. *Barrett v. Brewer*, 143—92.

When one conveys to another a lesser estate in land, and grantee took in recognition of grantor's right as the true owner, and when both parties to suit claim under same title, neither, as a general rule, shall be heard to deny or question the validity of the common source of title. *Sample v. Lumber Co.*, 150—160.

In action for wrongful cutting of timber by defendant under its contract, evidence in diminution of damages, that it has acquired a superior outstanding title, is competent. *Ibid*, 150—165.

Cloud upon.—Nonresident defendants cannot be deprived of protection of adverse possession and statute of limitations by plaintiff's styling the proceeding an action to remove cloud from title. *Weaver v. Love*, 146—417.

The purpose of Revisal 1589 is to permit any person to institute an action against another claiming an adverse interest in land, to have his title quieted and any cloud thereon removed. *Rutherford v. Ray*, 147—256.

Cloud upon title is something which, nothing else being shown, constitutes an encumbrance upon it or a defect in it—something that shows prima facie the right of a third party either to the whole or some interest in it, or to a lien upon it. *McArthur v. Griffith*, 147—549.

Revisal 1589, providing for removal of cloud upon title, should be liberally construed. Plaintiff need not delay seeking his equitable remedy till he has been disturbed in his possession by suit against him, and till final judgment has been had in his favor. It is sufficient, if, while in possession, one out of possession claims an estate or interest adverse to him. *Campbell v. Cronly*, 150—464.

Disputed.—When one takes possession under another, he may not

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dispute latter's title till he gives up possession. *Campbell v. Everhart*, 139—502.

Where title of plaintiff denied in action for rent before justice, action properly dismissed. *Hudson v. Hodge*, 139—308.

Equitable.—Owner of equitable title in crops may sue in justice's court. *Walker v. Miller*, 139—448.

Prescription.—Possession cannot be tacked to make title by prescription, when deed under which last occupant claims title does not include land in dispute. *Jennings v. White*, 139—22.

Public way cannot be acquired by adverse user, and by that alone, for any period short of twenty years. When it is dedicated by the owner to the public, time of user is no longer material. *Tise v. Whitaker*, 146—376.

Passes when.—Agreement by plaintiff to buy tobacco, and pay given price when graded and hauled to his warehouse, no money was in fact paid, and it was agreed that if tobacco burned it was plaintiff's loss, the title and right to possession passed to plaintiff, and evidence of its being insured at once is competent. *Andrews v. Grimes*, 148—439.

Quieting.—Processioning proceeding distinguished from action to quiet title. *Woody v. Fountain*, 143—67.

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Measure of damages for a pure tort. stated. *Bowen v. King*, 146—390.

See Master and Servant; Negligence.

Suit on contract.—Action against owner, who has failed to convey lot to purchaser procured by agent, may not be changed to one in tort and an amount in addition to commissions added as damages. *Realty Co. v. Corpening*, 147—614.

When demand arose out of tort, it may be waived and suit had on contract so as to be in justice's

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jurisdiction. *Stroud v. Ins. Co.*, 148—56.

TOWNSHIPS.

Townships are not corporate bodies nor have they any corporate powers whatsoever, unless authorized by legislature. *Wittkowsky v. Comrs.*, 150—94.

TRADE MARKS AND PATENTS.

Name.—Trade mark can only be acquired by actual user of the mark in the market. Mere intent to use particular marks, however clearly expressed, is insufficient in absence of actual user. *Tobacco Co. v. Tobacco Co.*, 145—375.

Right to trade mark is derived from its appropriation and continued user, and becomes the property of those who first employ it and give it a name and reputation. *Ibid.*, 145—378.

Train-sheets.

See Evidence, records.

Tramps.

See Master and Servant, willful acts; Damages, punitive; Railroads, trespassers.

Transactions With Decedent.

See Executors and Administrators, personal transaction with decedent; Executors and Administrators, services to decedent.

TREES.

Contract to cut and deliver cordwood, not within statute of frauds. *Ives v. R. R.*, 142—131.

Contract for sale of standing timber is within statute of frauds. *York v. Westall*, 143—281.

When city in exercise of discretion and for public welfare condemns trees on sidewalk, no legal right of citizen is infringed and they may be removed without previous notice to him. *Rosenthal v. Goldsboro*, 149—133.

Abutting owner has property in shade trees standing along side-

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walk which law will protect, and they may not be removed except when necessary for use of street as public highway. *Ibid.*, 149—136. See Timber Deeds.

TRESPASS.

Generally.—Entering upon land and cutting timber constitutes a continuing trespass, for which successive actions may be brought, damages recovered in each to date of writ. *Lumber Co. v. Lumber Co.*, 140—437.

One having neither possession nor right to land, cannot maintain trespass. *Latham v. Lumber Co.*, 139—9.

Payment of appraisal into court is a condition precedent to a right of entry for construction purposes by a railroad. *State v. Mallard*, 143—666.

See *Ry. v. R. R.*, 142—425; *State v. Wells*, 142—590.

Action of trespass *quare clausum fregit* is appropriate remedy for wrongful invasion of another's possession of realty, and to recover plaintiff must show that he had actual or constructive possession at time of alleged injury. *Gordner v. Lumber Co.*, 144—110.

Measure of damages for trespass upon land, cutting timber and building boggy road, is difference in value of land before and after injury complained of. *Brickell v. Mfr. Co.*, 147—119.

Every unauthorized and unlawful entry into the close of another is a trespass, from which the law infers some damage. *Brame v. Clark*, 148—365.

Judge's charge in action for trespass, approved. *Haddock v. Leary*, 148—380.

Where there has been a wrongful entry and trespass on one's land and he afterwards conveys land to another, right to recover for wrong is personal to him who owned land when same was committed. *Porter v. R. R.*, 148—566.

Railroad company can not be ousted from land by ejectment, nor

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subjected to successive and repeated action of trespass, but remedy for wrong, if one has been committed by occupation of land, is to be redressed by an award of permanent damages. *Porter v. R. R.*, 148—565.

See *Beasley v. R. R.*, 147—364.

Entry by lessee railroad company upon and taking locus in quo granted to lessor, and in furtherance of lessee's business, is lawful and no action lies against either. *McCulloch v. R. R.*, 149—308.

Revisal 1589 is a remedial statute, and in action for possession or to quiet title, not necessary to allege that defendant was in possession. *Land Co. v. Lange*, 150—30.

Statute making trespass upon land barred in three years from original trespass, means trespass caused by structures permanent in their nature and made by companies in exercise of some quasi public franchise. *Sample v. Lumber Co.*, 150—166.

Implied covenant of lessor to put lessee in possession at time stated, does not extend beyond time when lease is to commence. If after the time when lessee is entitled to possession, under terms of lease, a stranger trespass on or take possession of and hold leased premises, that is a wrong done to lessee, for which lessor cannot be held responsible. *Sloan v. Hart*, 150—274.

Use by defendant of strip of land adjoining its lot, and described in its deed as a street, though never opened up and worked by city, is not a trespass. *Bailliere v. Shingle Co.*, 150—638.

TRIAL.

Not due diligence to rely upon assurance of officer as to when case tried, upon removal to another justice. *Bullard v. Edwards*, 140—644.

Jury trial cannot be had when no exception was noted at time to

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order of reference. *Bruce v. Mining Co.*, 147—644.

Submission of additional issues after argument to jury on other issues, is discretionary with court. *Streator v. Streator*, 145—338.

Recalling witnesses for further examination is in discretion of court. In *re Abee*, 146—274.

Refusal to set aside verdict awarding excessive damages will not be reviewed unless there appears to be a gross abuse of discretion. *Freeman v. Bell*, 150—149.

Proceedings of court of record are in fieri, under absolute control of judge, subject to be modified or amended at any time before expiration of term in which they are had or done. *Cook v. Tel. Co.*, 150—429.

It is presumed that judge charged correctly as to all issues, in absence of showing to contrary. *Gerock v. Tel. Co.*, 147—8.

Where judge states in his charge that certain admissions were made on trial, if this was not true, it should have been corrected at the time. *State v. Lance*, 149—555.

Refusal to remove cause to another county for trial is not reviewable. *State v. Turner*, 143—641.

See *New Trial*.

TROVER AND CONVERSION.

When carrier delivers goods without production of bill of lading, it is liable in trover for their value to bona fide holder of such bill, taken for value before delivery of goods at destination, even where it delivered goods to shipper at intermediate point. *Development Co. v. R. R.*, 147—506.

TRUSTS AND TRUSTEES.

Trustee takes fee by implication when duties of trust require it, although it is in terms a life estate. *Smith v. Proctor*, 139—314.

When trustee in active trust barred, cestui que trustent barred

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also. *Kirkman v. Holland*, 139—185.

See *Cameron v. Hicks*, 141—21; *Sutton v. Jenkins*, 147—17.

Evidence that trustee made no attempt to recover possession of property, because told by life tenant not to, incompetent. *Kirkman v. Holland*, 139—185.

Trust, when not executed by Statute of Uses. *Ibid*, 139—185.

Bank holds collaterals as trustee and its duty is to protect them. *Lumber Co. v. Pollock*, 139—174.

Where wife bought land and her deed was lost before registration, and husband, after her death, procured deed to himself, he is a trustee for his children. *Norcum v. Savage*, 140—472.

Statement in intestate's letter to defendant to "hold the sum of \$1,000 for support of my child in case of my death, for such a time as it may hold out," creates a trust. *Witherington v. Herring*, 140—495.

Churches have right to appoint trustees to hold its property, etc., but Revisal 2670-1 does not apply to property held by it in trust. *Thornton v. Harris*, 140—498.

Clerk of court authorized to appoint successors, upon death of last survivor of church board of trustees. *Ibid*, 140—498.

Upon death of trustee, legal title descends to his heirs with trust impressed upon it. *Cameron v. Hicks*, 141—21.

Estate is conveyed to trustee for sole and separate use of a married woman and her heirs, and she becomes discoverer, necessity for preserving the separate estate being at an end, statute executes the use and she becomes absolute owner. *Ibid*, 141—21.

Where an estate is conveyed to trustee to preserve contingent remainders, statute will not execute the use. *Ibid*, 141—21.

Deed to trust estate of wife, executed by her and husband, without intervention of trustee, a nullity. *Ibid*, 141—21.

Deed to grantee as "trustee,"

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with habendum "to his own use and behoof," and no other use is declared, word "trustee" is surplusage, and deed signed by grantee, not as trustee, conveys legal and equitable title. *McAfee v. Green*, 143—411.

Under Rev. 1037, substituted trustee holds legal title upon same trusts as original trustee. *Ibid*, 143—411.

Active and passive trusts defined. *Webb v. Borden*, 145—196.

When trustee of active trust in remainder permit life tenant to be ousted by a stranger, statute of limitations begins to run against them from ouster. *Ibid*, 145—188.

Under Revisal 1580, trustees are seized as joint tenants, and if one is barred of his entry, co-trustees are equally so, and where there is an ouster of life tenant under deed made by one of them as commissioner, to third party, such deed is color of title. *Ibid*, 145—188.

Where one acquires title as trustee for another, statute of limitations began to run against him from time when he might be declared a trustee, or if trustee is barred, *cestui que trust* is also barred. *Sutton v. Jenkins*, 147—17.

In action to declare wife a trustee for benefit of insolvent husband, instructions proper. *Parker v. Fenwick*, 147—529.

In the construction of wills, the estate given to a trustee is to continue for so long a period as is necessary to enable him to execute the trust. *Haywood v. Trust Co.*, 149—219.

When a valid entry is laid, followed by a survey and grant, a prior grantee claiming under subsequent entry will be declared to hold the legal title in trust for subsequent grantee, claiming under first entry. *Lovin v. Carver*, 150—711.

Compensation.—Where trust deed provides for commission to trustee for making sale, etc., and "apply the proceeds of sale to the discharge of said debt," commissions

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will only be allowed on amount of debt secured. *Loftis v. Duckworth*, 146—344.

Creation.—No technical terms necessary to create a trust. Sufficient if language shows intention, clearly points out property, disposition of it, and the beneficiary. *Witherington v. Herring*, 140—495.

Declaration of a trust in personalty not required to be written; if in writing, may be contained in letters or other writings. *Ibid*, 140—497.

Devise to trustees "for education in common school branches of English education for poor white children," etc., sufficiently definite as a charity. In re *Murray's Will*, 141—588.

Specific trust will not be superimposed upon title conveyed to religious congregation, authorizing court to control their management of it, unless this is clear intent of grantor. *Hayes v. Franklin*, 141—599.

Ways in which trusts are created, explained. *Chappell v. White*, 146—575.

Since Revisal 3118, parol evidence is incompetent to fasten upon a devise of land a constructive or implied trust in favor of another. *Ibid*, 146—575.

It is not necessary that title be given in express terms to trustees, but if trust is otherwise manifested and a trustee named, he will, by implication, take such title and estate as is necessary to enable him to execute the trust. *Haywood v. Trust Co.*, 149—219.

Trust cannot be fastened on an absolute deed by evidence that grantee paid no consideration, or that he agreed to take and hold premises from grantor. *Gaylord v. Gaylord*, 150—230.

Rights and liabilities of trustees.—Trustee cannot, during existence of trust, buy in or by any other method, either directly or indirectly, acquire title to estate or property to which trust attaches, and

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hold it against his cestui que trust. *Dunn v. Oettinger*, 148—281.

Express.—Statute of Limitations runs against express trust only when there is an adverse holding. *Dixon v. Dixon*, 145—46.

Statute of Limitations never runs against express trust until by some declaration or act of trustee an end is put to the relation of trustee and cestui que trust, and the latter is put to his action. *Greenleaf v. Land Co.*, 146—508.

See *Lowder v. Hathcock*, 150—439.

Conveyance made by one to himself as president of corporation reciting purchase by him as agent for company, is ineffectual to convey title, but is a valid declaration of an express trust in favor of corporation, upon valuable consideration. *Ibid*, 146—508.

Parol.—Where one promises, in parol, as an inducement to conveyance of land, to hold title for benefit of another, such promise is enforceable. *Davis v. Kerr*, 141—11.

Evidence of conduct and declarations of one holding title under parol trust, before and after sale, and manner of dealing with property, competent. *Ibid*, 141—11.

To enforce parol trust, declarations must clearly indicate intention to attach to legal title, at time it passes to grantee, a trust, the terms of which shall be sufficiently definite to enable court to enforce its execution. *Faust v. Faust*, 144—386.

Parol and constructive trusts not within Statute of Frauds. *Russell v. Wade*, 146—124.

Parol trusts arise, when? *Gaylord v. Gaylord*, 150—226.

In deed of this character, giving on the face clear indication that an absolute estate was intended to pass by recital of valuable consideration paid or express covenant to warrant and defend the title, no trust would be implied or result to grantor because no consideration was paid. *Ibid*, 150—226.

Where absolute deed is made,

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parol evidence is inadmissible to prove that deed was made under any special trust for the grantor, and that a valuable consideration was not paid. *Ibid*, 150—230.

In action to fix resulting trust on land bought by one at public sale for another, both deceased, testimony of witnesses who are parties and interested in result of action as to conversation between deceased parties, tending to establish trust, is incompetent. *Harrell v. Hagan*, 150—244.

Resulting.—A purchaser of land who has title taken in name of another, acquires no title or estate therein, but an equity to call for execution of resulting trust by conveying legal title to him. *Latta v. Electric Co.*, 146—296.

Revocation.—Trust not revoked by will, when. *Witherington v. Herring*, 140—495.

Power of revocation may be reserved and is perfectly consistent with creation of valid trust. *Ibid*, 140—495.

Title in name of another.—Where one has promised to hold title for himself and plaintiff, to be their joint property, but title is taken in name of defendant alone, land has risen in value and he refuses to convey to plaintiff, he is a trustee *ex maleficio*. *Russell v. Wade*, 146—121.

When one has, by his promise to buy, hold or dispose of real property for benefit of another, induced action or forbearance by reliance upon such promise, it would be a fraud that the promise should not be enforced. *Ibid*, 146—121.

When one promises to hold land for himself and another, but takes title in his own name, remedy is not specific performance of contract, but enforcing the execution of a trust. *Ibid*, 146—122.

Shifting.—An estate to one, with a declaration of the use to grantor's wife and two named daughters in fee "and to survivors of them," will, nothing else appearing, vest the use of the fee in two

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daughters after death of wife; for, though no estate could be limited upon a fee simple, at common law, a limitation of this kind may take effect by way of shifting use. *Campbell v. Cronly*, 150—468.

Ultra Vires.

See Corporations, ultra vires acts; Municipal Corporations, ultra vires acts of.

UNDUE INFLUENCE.

Evidence insufficient to justify setting aside deed for undue influence. *Myatt v. Myatt*, 149—139.

Judge's charge upon undue influence in procuring deed, proper. *Ibid*, 149—141.

Relief will be afforded where deed was procured by fraud, not only against the principal, where he is grantee in deed, but also against persons who were or have become beneficiaries of the fraud, when they are volunteers or purchasers with notice, or when deeds have been procured by fraud or undue influence of one who is acting as agent of grantee. *Beeson v. Smith*, 149—145.

If deed is procured by fraud or undue influence of one acting as agent of grantee therein; or if grantee in such deed was a volunteer or bought with notice of the wrong done, or of facts sufficient to put man of average business prudence on inquiry that would lead to knowledge, grantor is entitled to adequate relief. *Ibid*, 149—146.

Substitution of a deed for a will, by a confidential friend, is the grossest moral fraud. *Smith v. Moore*, 145—271.

United States Courts.

See Fraud and Mistake; Removal of Causes.

USURY.

Profit realized by defendant on land bought for plaintiff, not usury, unless device to conceal usurious

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transaction. *Yarborough v. Hughes*, 139—200.

Jury must be satisfied by clear proof that more than legal interest was intentionally and wrongfully received by creditor. *Bennett v. Best*, 142—168.

Facts and circumstances, amount paid and due and calculations made, competent. *Ibid*, 142—168.

Vacation.

See Judgment, out of term.

Vaccination.

See Smallpox.

Variance.

See Pleading, variance; Complaint, sufficiency of.

VENDOR AND VENDEE.

If purchaser fails to pay for goods delivered, and evinces purpose not to pay for future delivery, vendor may rescind and sue for those delivered. *Grocery Co. v. Bag Co.*, 142—174.

See Sales; Specific Performance; Liens; Contracts, bond for title.

VENUE.

Venue act of 1905 applies to all railroads, both domestic and foreign. *Propst v. R. R.*, 139—397.

Where one cause of action is for recovery of personal property, removal to county where property situate, proper. *Edgerton v. Games*, 142—233.

Refusal to remove cause to another county for trial is not reviewable. *State v. Turner*, 143—641.

When suit has been commenced by corporation returnable to county of its residence as fixed by charter, defendant cannot move it to county of which it is a citizen, though plaintiff may have moved its principal place of business from State. *Garrett v. Bear*, 144—23.

Motion to remove cause from one county to another, when complaint

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filed and time to answer expired, is too late. *Ibid*, 144—23.

Agreement between counsel for time to file answer is acceptance of jurisdiction and waiver of right to remove. *Ibid*, 144—23.

Motion to remove must be made in district and during term of court. *Ibid*, 144—23.

Refusal to remove cause for convenience of witnesses and in interest of justice, not reviewable. *Ibid*, 144—23.

Action for penalty can be brought against foreign defendant before magistrate in any county in which it does business or has property, or where plaintiff resides. *Allen v. R. R.*, 145—37.

Action brought in superior court in wrong county will not be dismissed, but removed to proper county if asked in time. *Ibid*, 145—37.

When venue of suit is in wrong county, it may be tried therein, unless defendant, before time of answering expires, demands in writing that trial be had in proper county. *McCullen v. R. R.*, 146—569.

Question of venue differs from that of jurisdiction, which can be raised only by demurrer. *Ibid*, 146—569.

Action to recover penalty for delayed shipment must be brought in county where cause of action or some part thereof arose. *Ibid*, 146—569.

Where jurisdiction is acquired, question of improper venue cannot be raised in subsequent action. *Rutherford v. Ray*, 147—257.

Objection to improper venue made in answer, perhaps sufficient in respect to time. *McArthur v. Griffith*, 147—550.

Prayer for removal for improper venue, not sufficiently stated. *Ibid*, 147—551.

Where property situate.—Action for possession of deed in escrow, upon allegation that condition has been performed and delivery refused, should be brought in county

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where land lies, for right to recover land, not the deed solely, depends upon his ability to establish the facts alleged. *Bridgers v. Ormond*, 148—376.

VERDICT.

Generally.—Entire verdict vitiated where it is indivisible and cannot be ascertained to what extent incompetent evidence influenced the jury. *Dunn v. Currie*, 141—123.

Trial judge has no power to reduce a verdict without consent of party in whose favor it was rendered. *Isley v. Bridge Co.*, 143—51.

Verdict rendered on Sunday is valid. *Tuttle v. Tuttle*, 146—493.

Where jury answered issue as to damages "Five thousand," it is presumed from pleadings and evidence that "dollars" were intended. *Cox v. R. R.*, 149—86.

If a question of law is submitted to the jury and they decide it correctly, error is cured by verdict. *Hardy v. Ward*, 150—395.

To maintain private action for damages caused by public nuisance, owner is not required to establish the existence of damage special and peculiar in reference to injury generally suffered by other adjacent owners who are similarly situated, and where issue as to special damage was answered "nothing" verdict is not sufficiently full and responsive to entitle either party to judgment. *McManus v. R. R.*, 150—662.

Contradictory.—When issues are answered one way, and jury hand judge a paper stating their reasons for finding as they had, which was contradictory to the verdict, no judgment can be based upon it. *Smith v. Moore*, 145—271.

Directed.—Where party requests court to instruct jury to find in his favor, adverse party entitled to have evidence considered most strongly in his favor, as in case of motion to nonsuit. *Board of Education v. Makely*, 139—30.

When burden is upon defendant, court cannot direct verdict in its

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favor, when more than one conclusion upon evidence can be reached by fair-minded men. *Taylor v. Security Co.*, 145—383.

In action for penalty for delayed shipment, jury should pass on question of delay and amount of recovery, under proper instructions, instead of directing verdict for plaintiff, if evidence was believed. *Ice Co. v. R. R.*, 147—62.

Prayer for instruction which asks court to direct findings of jury upon contributory negligence in favor of defendant, upon whom is burden of proof, properly refused. *Britt v. R. R.*, 143—42.

See *Hawk v. Lumber Co.*, 149—17.

Impeaching.—Jurors cannot be heard to impeach their verdict. *Coxe v. Singleton*, 139—361.

Law does not favor evidence from jurors impeaching their verdict. *Muse v. R. R.*, 149—452.

Set aside.—Court may set aside verdict, but has no power to reverse answer of jury. Action when not reversible error. *Sprinkle v. Wellborn*, 140—164.

Supreme court has no power to interfere with verdict when there is proper evidence for jury. *Brown v. Power Co.*, 140—334.

Supreme court has unquestioned power to set aside a verdict not supported by evidence. *Ibid*, 140—334.

Judge should state, when he sets aside verdict, whether it is in exercise of discretion or not. *Jarrett v. Trunk Co.*, 142—466.

Judge should set aside verdict when he thinks an injustice has been done, or where damages are excessive or inadequate. *Isley v. Bridge Co.*, 143—51.

Judge has no right to set aside verdict at succeeding term, although he held both terms, unless parties consent to continuance of motion. *Clothing Co. v. Bagley*, 147—38.

Refusal to set aside verdict awarding excessive damages will not be reviewed unless there ap-

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pears to be a gross abuse of discretion. *Freeman v. Bell*, 150—149.

See *Moore v. Lbr. Co.*, 150—264.

When judge sets aside finding upon issue of damages and ordered new trial, proper course is to except and not appeal. *Billings v. Observer*, 150—542.

Special.—Where special verdict is so defective that court cannot pronounce judgment upon it, rule is to order new trial. *State v. Hanner*, 143—636.

VERIFICATION.

Affidavit in divorce case should be filed in action to annul marriage contract for incapacity. *Johnson v. Johnson*, 142—462.

See *Pleadings*, verified.

VESTED REMAINDERS.

Where doubtful language is used by testator, court inclines to that construction which makes title to property left in remainder vested, rather than contingent. *Freeman v. Freeman*, 141—99.

See *Remainders and Reversions*.

VESTED RIGHTS.

While office of sheriff is constitutional, regulation of fees is within control of legislature, and same may be reduced during term of incumbent. *Coms. v. Stedman*, 141—448.

See *Contracts*, violation of.

Vice Principal.

See *Master and Servant*, acts of; *Negligence*.

VOTER.

Qualified.—Qualified voter is one who is entitled to register as a voter, and who is also qualified to vote after such registration. *Pace v. Raleigh*, 140—73.

See *Elections*.

Wager.

See *Insurance*, insurable interest; *Contracts*, against public policy.

WASTE.**WAIVER.**

Though one is not served with summons, if he appeared either personally or by duly authorized attorney, this waives service. *Hatcher v. Faison*, 142—364.

See *Contracts*, ratification; *Insurance*, payment of premiums; *Jury*, waiver of trial by; *Reference*.

Ward.

See *Guardian and Ward*.

WAREHOUSEMAN.

When goods arrive and charges are paid, defendant is warehouseman and not common carrier, and liable for only ordinary care. *Stone v. Steamship Co.*, 139—193.

Warehouseman to use ordinary care, when liability as common carrier ceases. *Trouser Co. v. R. R.*, 139—382.

See also, *Bailment*; *Carriers*, warehouseman.

WARRANTY.

Land sold other than by judicial decree, no implied warranty as to title, quantity or encumbrances. *Peacock v. Barnes*, 139—196.

Warranty extends no further than land described in deed containing warranty. *Dixon v. Jones*, 139—75.

As a general rule there is an implied warranty on part of assignor of judgment that it is a valid subsisting obligation against debtor for amount specified, and has not been paid, in whole or in part. *Mfg. Co. v. Fertilizer Co.*, 150—418.

Test as to what constitutes a warranty, stated. *Smith v. Alphin*, 150—427.

WASTE.

Owner of inheritance may maintain action for waste. *Latham v. Lbr. Co.*, 139—9.

Contingent remainderman cannot maintain action for waste. *Ibid*, 139—9.

Interest of contingent remainderman in timber will be protected

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from waste by court of equity by injunction. *Ibid*, 139—9.

Waste defined. *Norris v. Laws*, 150—604.

Life tenant has right to make additional clearings, if in exercise of prudence and judgment it was required for his support, and an instruction is erroneous which makes this right depend solely upon value of timbered land as compared with value of cleared land. *Ibid*, 150—606.

In action for waste by cutting timber, jury should have been instructed so as to find whether there had been a lasting injury to the inheritance and especially as to how much land life-tenant was entitled to clear for her reasonable support, in exercise of careful husbandry and prudence, and instruction which assumes that timbered land is more valuable, is erroneous. *Ibid*, 150—606.

WATERCOURSES.

Generally.—Riparian owner entitled to have stream flow through land in its ordinary purity and quantity without unreasonable diminution by owners above. *Durham v. Cotton Mills*, 141—615.

Proprietors along course of stream have no property in flowing water itself, but each may use it for any purpose without material injury to rights of others. *Ibid*, 141—615.

Whether upper proprietor is exercising reasonable use of stream, question for jury. *Ibid*, 141—615.

Injunction proper remedy to prevent fouling stream by improper use. *Ibid*, 141—615.

Rev. 3051 prohibiting discharge of sewage into any stream from which public drinking supply is taken without reference to distance of such discharge from point of intake, constitutional. *Ibid*, 141—616.

Upper proprietor may increase flow of water from his land, but it should not be diverted to detri-

WATER.

ment of lower proprietor. *Briscoe v. Parker*, 145—17.

Remedy for improper drainage by upper proprietor is action for damage, or he may proceed under Revisal 3983. *Ibid*, 145—14.

When a canal company was authorized, but not required, by statute to divert water of a stream, which they did for forty years, riparian owners below have no right to insist that diversion should be continued for their benefit. *Canal Co. v. Burnham*, 147—51.

WATER.

Ponding.—Action for ponding water barred if substantial injury done prior to five years next before suit. *Stack v. R. R.*, 139—366.

In action for ponding water caused by improper construction of culvert, measure of damages is market value of land taken and deterioration of other by flooding. *Myers v. Charlotte*, 146—246.

In action for injury to farm land by ponding water where plaintiff has testified as to value of crops before sewer was built, evidence of neighbors as to what it would probably produce now and before ponding, though they had no actual knowledge of what it had produced, is competent. *Ibid*, 146—247.

Judge's charge upon liability for ponding water, approved. *Davenport v. R. R.*, 148—293.

When railroad has acquired right of way, it may construct road across plaintiff's land, but it may not close up a ditch draining the land. It is liable for failure to make provision for water to flow under or through roadbed, and cause of action accrued from time substantial damage was sustained, and not from time roadbed was constructed. *Willis v. White*, 150—203.

Where independent contractor built railroad by plans of engineers, and on account thereof plaintiff's land was sogged after contractor had completed and turned

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over road to company, contractor is not liable. *Ibid*, 150—204.

WEIGHTS AND MEASURES.

Use of untested.—Revisal 3073 providing for testing weights and measures by standard keeper, or imposing penalty for "using, buying or selling," by other than standard weights and measures, does not apply to railroad companies using scales to weigh shipments. *Nance v. R. R.*, 149—373.

WIDOWS.

Estate to wife during her widowhood, is for life only. *Sink v. Sink*, 150—446.

See Homestead and Exemptions; Dower.

Year's support.—Where one contracted to support his aunt, in consideration of a deed from her to him, reserving to her a life estate, nephew went into possession to make a crop, without a reserved rent, and he died that summer, his widow is entitled to year's support out of crop and balance goes to his administrator to pay reasonable compensation for use of land. *Sessoms v. Tayloe*, 148—374.

Wife.

See Husband and Wife; Married Women.

WILLS.

Generally.—When will is probated after letters of administration have issued, clerk should revoke letters and notify administrator, and until notice, his acts done in good faith are valid. *Shober v. Wheeler*, 144—403.

Substitution of a deed for a will, by a confidential friend, is the grossest moral fraud. *Smith v. Moore*, 145—271.

Presumption is that testatrix intended by her will to dispose of all of her property, and not die intestate as to any part of it. *Powell v. Wood*, 149—238.

Propounders of will are not required to prove identity of one who

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signed will as testatrix, when allegations are that her signature has been obtained by duress, etc. *Harris v. Martin*, 150—368.

Capacity to execute.—If testator at time he signed will had mental capacity to know and understand what he was doing, the property he owned and wished to dispose of; the relation he bore to his property and the persons to whom he was giving it; the nature of the act in which he was engaged, and its extent and effect, he had sufficient mental capacity to make will. In *re Thorp*, 150—492.

Caveat.—Statute of limitations bars caveat to will in seven years, though petitioner be feme covert. In *re Beauchamp*, 146—257.

Party interested may file caveat to will probated in common form and require propounder to prove will in solemn form, if right has not been lost by acquiescence or unreasonable delay. In *re Hedgepeth*, 150—250.

Construed.—Lands devised to daughter for life "and after her death the said lands are to go to the children of my said daughter and the children of such as are dead," life-tenant who is living, had several children, one of whom married and died, leaving plaintiffs, the issue of such marriage, plaintiff has contingent remainder. *Latham v. Lbr. Co.*, 139—9.

Will gave to son in Mississippi privilege to return and take certain land, or remain and receive other property; estate in land here never vested while he remained in Mississippi. *Pitchford v. Limer*, 139—9.

In construction of will, court endeavors to ascertain and effectuate intention of testator, as gathered from language used. *Freeman v. Freeman*, 141—97.

Where will directs that all property be sold upon death of wife and proceeds divided among testator's children, only children living at death of widow share in proceeds. *Ibid*, 141—97.

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Where doubtful language is used by testator, court inclines to that construction which makes title to property left in remainder vested, rather than contingent. *Ibid*, 141—99.

Devise of "the use and benefit and profit," of one's land during her natural life, and "to the lawful heirs of her body after her death," conveys fee. *Perry v. Hackney*, 142—368.

Devise of "rents, issues and income" of lands passes the land itself. *Ibid*, 142—372.

While under some circumstances the declarations of testator are competent upon question of factum of the will, they are not competent as to the interpretation of contents of will. In *re Shelton's Will*, 143—222.

Devise of lands in trust to one, and after his death to his issue forever, when it appears in an ulterior limitation that the words "issue" and "children" were used in the will as correlative terms, passes only an equitable estate for life to the first taker, and an equitable estate in fee to his children. *Faison v. Odom*, 144—107.

Devise to S, and the lawful heirs of his body forever, confers an estate fee-tail, converted into a fee simple under the statute. *Sessoms v. Sessoms*, 144—121.

In the construction of a will, the word "lend" passes the property to which it applies in the same manner as the use of the words "give" or "devise," unless testator manifestly did not intend estate to pass. *Ibid*, 144—121.

When by operation of the statute a fee-tail is converted into a fee-simple, with a limitation of a fee upon the death of the first taker without heirs, a separate estate is created direct from testator to second taker upon the happening of the contingency, under the doctrine of shifting uses and by way of executory devise, and is not a qualification of the estate of the first taker or too remote since *Revisal*, sec. 1581. *Ibid*, 144—121.

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Devise of "the residue of my lands in Sampson county" is specific, and land so devised is not, in absence of express language in will, or such as clearly indicates intention of testator to make it so, chargeable with payment of pecuniary legacies. *Morisey v. Brown*, 144—154.

Land devised by testatrix to three daughters during their natural lives and the natural lives of the survivors, with remainder over to heirs at law, providing that should any of daughters die without issue of her body the share of such daughter shall go to other daughters, conveys joint estate in fee under rule in *Shelley's Case*. *Walker v. Taylor*, 144—175.

A court of equity will not undertake to construe a will where the rights involved have not come in question, for rights of devisees are purely legal and they must be adjudged when a cause of action arises. *Hepinstall v. Newsome*, 146—504.

A devise of an estate in fee to testator's daughter, after life estate of their mother, determinable as to each daughter's share on her dying without leaving a "lawful heir," the event by which the interest of each is to be determined must be referred, not to death of deviser, but that of several takers of remainder, respectively, without leaving a lawful heir. *Harrell v. Hagan*, 147—113.

The devise in this case construed a contingent remainder, the children having died before the life-tenant and without leaving issue. *Staton v. Godard*, 148—435.

Statement in a will that one son "has had his full share out of mine and his mother's estate," means to exclude him from any further share. *Harper v. Harper*, 148—457.

Whenever there is a will the presumption is that testator intended to dispose of all his property, and the expression "personal property to be disposed of," means simply

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that it is to be converted into money. *Ibid*, 148—457.

Action to construe will and also raising issue of *devisavit vel non* is unusual, but whole matter will be determined in one action where all parties are in court and they request it. *Ibid*, 148—458.

Where there is a gift of a specific chattel for life, and then over, the executor may assent to the legacy and discharge himself from liability to remainderman by delivering it to tenant for life, for the assent to that legacy is an assent to the one in remainder. *In re Knowles*, 148—465.

Courts of equity have jurisdiction in matters of construction of wills involving administration of trusts, and when devises and legacies are so dependent on each other as to make it necessary, it will construe whole will to determine rights of beneficiaries. *Haywood v. Trust Co.*, 149—216.

Use of word "estate" in a will includes testator's land and is not restricted to personal property. *Powell v. Wood*, 149—238.

This instrument reciting valuable consideration, description, *habendum* clause, and "the purpose and intent of this deed is to convey above property to Ben Miller, but title is vested in Henry Dick during his natural life, then title passes to Ben Miller," is a deed and not will. *Dick v. Miller*, 150—63.

Where language is used having a clearly defined legal significance, there is no room for construction to ascertain the intent; it must be given its legal meaning and effect. *Campbell v. Cronley*, 150—469.

Where testatrix gave life estate to her husband, remainder to her niece provided she lived with her uncle till she became free, or married, her intention will govern and fee will vest in niece, though she was required to leave uncle's home on account of his insanity. *Lynch v. Melton*, 150—596.

Devisavit vel non.—In trial of

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issue of *devisavit vel non*, cause should be entitled "In re will of," etc. *Fraley v. Fraley*, 150—516.

Execution.—It requires more mental capacity to execute deed than a will. *Bond v. Mfg. Co.*, 140—381.

Not necessary that party should sign his name, his mark is sufficient, though he be able to write. *In re will of Pope*, 139—488.

Where witness to will as such, who was able to write, held pen while his entire name was written, will valid. *Ibid*, 139—484.

Statement made by will, that will made before marriage is her last will does not constitute re-execution. *Means v. Ury*, 141—248.

On issue of *devisavit vel non*, declaration made by wife of testator at time of preparation of will, not in presence of testator or anyone connected with will or its execution, incompetent. *In re Murray's will*, 141—588.

Devise to trustee "for education in common school branches of English education for poor white children," etc., sufficiently definite as a charity. *In re Murray's will*, 141—588.

On issue of *devisavit vel non*, not competent to prove by witness, whose husband was caveator and heir at law of decedent, declaration of testator to show undue influence. *Linebarger v. Linebarger*, 143—229.

Upon issue of *devisavit vel non*, declaration of testator regarding execution of will showing state of his mind, made at time or so near as to be part of *res gestae*, competent. *Ibid*, 143—229.

Declarations of testator regarding execution of will, showing undue influence, made prior to its execution, competent. *Ibid*, 143—229.

Declarations of testator made prior to execution of will, not sufficient as to undue influence, in absence of evidence showing any acts of undue influence or admissions thereof. *Ibid*, 143—229.

Upon issue of *devisavit vel non*,

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age of testator, mental and physical condition, competent. *Ibid*, 143—229.

Declarations of testator made prior to execution of will, coupled with those made by one devisee, alleged to have exerted undue influence over testator, competent for jury upon issue thus presented. *Ibid*, 143—229.

Signing will by the two witnesses must be in presence of testator. *In re Baldwin*, 146—25.

An attestation, if not on the same sheet of paper as signature of testator, must be on a paper physically connected with that sheet. *Ibid*, 146—30.

Testimony of witnesses to will that they were sent for and introduced to person who they never saw before, but who answered to name of testatrix, and that will was drawn and executed by such person as testatrix named in will, is sufficient upon question of identity. *Harris v. Martin*, 150—369.

Testator should be in a position to have power, without a removal of his person, to see witnesses sign his will. If he is able to see attestation by witnesses, it is not material to prove that in fact he did not see it. *Fraley v. Fraley*, 150—515.

Holding under.—Taking possession of property under will or other instrument and exercising unequivocal acts of ownership over it for a long time, will amount to a binding election. *Hogard v. Jordan*, 140—614.

Holograph.—Judge's charge in this case as to what is meant by a holograph will being found among valuable papers, approved. *Harper v. Harper*, 148—455.

Lapsed legacy.—Where will provided that legacy to brother shall go to a church, if legacy lapsed, and another legacy lapsed but no express provision was made as to this, testator died intestate as to this property and it descends to legatee's heirs. *Battle v. Lewis*, 148—147.

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Probate.—Will should be admitted to probate, if properly executed though propounder offers no evidence of beneficiary under will capable of taking. *In re Murray's will*, 141—588.

Where testator died and probate of will in 1857, was defective, and upon subsequent probate in 1906 under Rev. 3127, and duly recorded, properly admitted as evidence. *Steadman v. Steadman*, 143—345.

In absence of some statute, no limit upon time after testator's death within which will may be proven, and it then relates back to death of testator. *Ibid*, 143—345.

In ejectment, one who claims under deed from devisee in will can not question validity of probate of will. *Ibid*, 143—345.

Deed made by foreign executors to purchasers at sale under power of sale in mortgage is an execution of the contract in the mortgage, and subsequent probate of will in county where land lies relates back to time of and validates deed, if rights of third persons do not intervene. *Scott v. Lbr. Co.*, 144—44.

Probate of will in common form is valid till set aside. *In re Beauchamp*, 146—256.

Action to probate will in solemn form will be dismissed where petitioner had knowledge of probate of will in common form, qualification of executors for 40 years, their removal from State and final account and settlement, to which she was a party. *Ibid*, 146—256.

Contents of lost will may be proved by evidence of one witness though interested, whose veracity and competency are unimpeached. *In re Hedgepeth*, 150—249.

Clerk may take probate of lost will, or one destroyed by some other person than testator, or by testator not having animus revocandi, and bill in equity to set up will is not necessary. *Ibid*, 150—249.

Party interested may file caveat

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to will probated in common form and require propounder to prove will in solemn form, if right has not been lost by acquiescence or unreasonable delay. *Ibid*, 150—250.

See *In re Beauchamp*, 146—256.

Proof required to be shown by propounder of will for probate in solemn form, stated. *Ibid*, 150—251.

Evidence in this case insufficient to permit probate in common form. *Ibid*, 150—252.

Residuary clause.—Generally, in a will of personal property the general residuary clause carries whatever is not otherwise legally disposed of, but this rule does not apply when bequest is of a residue and first disposition fails. *Battle v. Lewis*, 148—149.

Unless the contrary intent appears, disposition by testator in his will of residue of his estate, will pass both real and personal property. *Powell v. Wood*, 149—239.

Undue influence.—To avoid will for undue influence, influence complained of must be controlling and partake to some extent of nature of fraud. *In re Abee*, 146—274.

The influence which destroys validity of will is a fraudulent influence, controlling mind of testator so as to induce him to make a will which he otherwise would not have made. *Ibid*, 146—274.

Revocation.—Cancellation, obliteration or erasure made after execution of will, which does not in fact destroy some portion of material substance, is not a revocation. *In re Shelton's will*, 143—218.

Declarations of testator made after date of an alleged revocation written on the margin of a will, tending to prove that he did not write or execute the alleged revocation, were competent. *Ibid*, 143—218.

Declarations of testator may not be received to explain, change or

WITNESSES.

add to a written will, nor can it be revoked by parol. *Ibid*, 143—218.

In proceeding for probate of will, on margin of which was an alleged revocation, after its due execution is proved, burden is upon contestant to show legal revocation. *Ibid*, 143—218.

Where will has not been found since its execution, there is a presumption of fact that it was destroyed by testator *animo revocandi*, but not when last seen in possession of third person. *In re Hedgepeth*, 150—251.

WITNESSES.

Witnesses testifying under subpoena entitled to same respectful treatment by counsel as parties to cause. *Davis v. Kerr*, 141—11.

Witnesses above two to each material fact receive no pay. *S. v. Wheeler*, 141—777.

Court should call on counsel to state what he expects to prove, or let jury retire, where question objected to and it cannot be seen why it is incompetent. *Hicks v. Hicks*, 142—231.

See *Baker v. R. R.*, 144—40.

Character.—Character of a witness is not an issue in itself. It comes in question incidentally and collaterally, and specific charges of corrupt acts are not to be heard to impeach it. *S. v. Arnold*, 146—603.

Plaintiff's witness on cross-examination testified to defendant's good character; on redirect whether he heard defendant had committed certain offenses, incompetent. *Coxe v. Singleton*, 139—361.

Examination of.—Cross-examination of adversary's witness not necessarily confined to matters about which he has testified on examination in chief, but may extend to and include any matter relevant to inquiry. *Smith v. R. R.*, 147—607.

Where in answer to question, witness expresses an opinion, not objected to at the time, and he

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subsequently gives a responsive answer, there is no error. *Midgette v. Mfg. Co.*, 150—340.

Expert.—Findings, supported by evidence that witness is an expert, are not reviewable. *Allen v. Traction Co.*, 144—288.

Finding of court, upon proper evidence, that witness is an expert, is conclusive. *Horne v. Power Co.*, 144—375.

Expert witness may testify to pertinent facts at issue in case, coming under his own observation and to such expert opinion thereon as is proper and within his peculiar knowledge and training. *Ibid.*, 144—375.

Fees.—When witness subpoenaed to prove negligence is not used, because of amendment of pleadings at term eliminating the issue, and cause subsequently tried in absence of witnesses, it is exception to general rule that only witnesses for successful litigants, under subpoena, examined and sworn or tendered at trial can prove attendance. *Herring v. R. R.*, 144—208.

Rule that only witnesses subpoenaed, sworn and tendered at trial can prove, sometimes modified where it appears by motion, in apt time, that witness was unavoidably absent at time of trial and his evidence was material. *Ibid.*, 144—209.

Infamous.—Conviction of witness in another State would not render him an infamous person and vitiate his testimony in action here. *In re Ebbs*, 150—49.

Impeaching.—One may show that facts are otherwise than as testified to by his witness, and it may be done by testimony of other witnesses, other statements of same witness, and at times by attending facts. *Smith v. R. R.*, 147—608.

In action for burning over land, it is competent to ask plaintiff if someone else owned timber burned. *Gay v. R. R.*, 148—341.

Declarations of boat hand, made

WRITS.

after drowning of passenger, are incompetent for proving dangerous condition of bateau; but defendant having examined him as its witness as to condition of bateau, it was competent to impeach or contradict his evidence upon that point by his declarations to another. *Pate v. Steamboat Co.*, 148—573.

Recalled.—Recalling witness for further examination is in discretion of court. *In re Abree*, 146—274.

Separated.—Where court upon motion of prisoner's counsel made order that witnesses be sent out of court room and separated, refusal to allow one of defendant's witnesses, who was kept in court room contrary to order of court and without its knowledge, to testify, not ground for new trial. *State v. Hodge*, 142—676.

Sworn.—One cannot except because court stood aside a juror for incompetency, and whether the reason given was correct or not the finding is not reviewable. That witness was not properly sworn, or not sworn at all, can not be considered after verdict. *State v. Peterson*, 149—534.

Tendered.—Tender of witnesses by defendant in order to have fees taxed, does not take from it the right to open and conclude argument. *Brown v. R. R.*, 140—154.

Woods.

See Railroad fires.

WORDS.

If one's use of words brings his attention so expressed, within settled rule of law, latter must prevail. *Wilkins v. Norman*, 139—43.

Where testator employs words having well known legal meaning, he is deemed to have used them in such sense. *Ibid.*, 139—43.

Writs.

See Summons; Possession Process.

YEAR'S ALLOWANCE.

YEAR'S ALLOWANCE.

Widow who declines to take two children, under fifteen, of husband by former marriage, entitled to \$300 as year's allowance. In re Stewart, 140—28.

YEAR'S ALLOWANCE.

Where husband and wife separated, she living here at time of his death in foreign State, her year's support should be allotted from a fund due husband in this State. Jones v. Layne, 144—600.
See Widows; Dower. / -

